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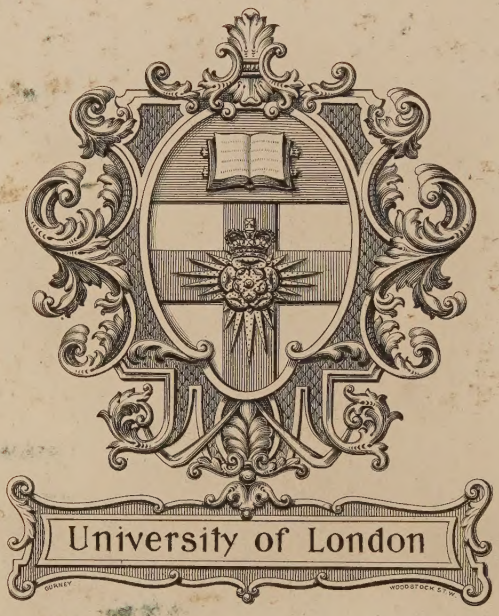
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ERRATA.

Page	*Line*	*For*	*Read*
22	foot-note (3)	2 Mer. 362	2 Mer. 363.
33	line 2	*Marquis of Northampton* v. *Salt*	*Salt* v. *Marquis of Northampton.*
104	The last line of the head-note should read— "especially applicable under the Real Property Act system of land registry in South Australia."		
105	1 (from bottom)	*Sir E. Carson, S.-G., Lawson Walton, K.C.*	*Lawson Walton, K.C., T. H. Carson, K.C.*
106	foot-note (8)	3 De G. & J.	3 D. F. & J.
184	foot-note (3)	1897	1876.
200	3 from bottom	"principle"	"doctrine."
214	foot-note (2)	6 App. Cas. 582	6 App. Cas. 193.
217	„ (2)		
218	„ (5)		
219	„ (2)		
218	8 from bottom	Lord Watson	Lord Blackburn.
218	5 „	"in the construction"	"of the construction."
220	head-note, line 7	L. R. 4 H. L. 215	L. R. 4 H. L. 171, 215.
223	foot-note (1)	4 B. & A.	4 B. & Ad.
463	„ (1)	[1902] A. C. 24	[1902] 1 Ch. 53.
486	„ (7)	5 Ch. Rob. 127	5 Ch. Rob. 128.
512	„ (4)	1 H. & C.	1 H. L. C.
539	line 9	"for a term"	"for a time."
552	2 (head-note)	"enacts that"	"relates to."
571	foot-note (2)	1 Moore (N.S.)	1 Moo. P. C. (N.S.)

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

HIGGINS AND OTHERS . . . . . APPELLANTS; H. L. (E.)

1901

AND

DAWSON AND OTHERS . . . . . RESPONDENTS. *Nov.* 28.

Will—Construction—Bequest of Pecuniary Legacies—Bequest of "Residue and Remainder" of Specific Mortgage Debts—Intestacy—Undisposed of Personal Estate acquired between Dates of Will and Death—Administration—Legacies, Specific or Demonstrative—Fund applicable for Payment—Ambiguity—Intention—Extrinsic Evidence, Admissibility of—Evidence dehors the Will.

A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding "and legacies"), to three persons named. At the date of the will the testator's personal estate consisted of the two mortgage debts, which were just sufficient for payment of the legacies (if payable thereout), debts, and funeral and testamentary expenses. Subsequently to the date of his will the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two

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mortgage debts, was not sufficient for payment of the debts, funeral and testamentary expenses and legacies.

On an originating summons to ascertain in what order the assets should be applied :—

Held, that "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies.

The decision of the Court of Appeal, [1900] 2 Ch. 756, reversed for the reasons there given by Rigby L.J.

JOHN GRAINGER by will made in 1895 directed and bequeathed property as stated in the head-note. The property of which he was possessed then and at the time of his death in 1898 is also there mentioned. Evidence of the property acquired between those dates was given by affidavit, and allowed to be read, though objected to as inadmissible. Details not necessary for the present report are set out in the report of the case below. (1) Upon an originating summons Stirling J. held that according to the true construction of the will and in the events which had happened "the residue and remainder" of the two mortgage debts meant what was left after payment thereout of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies.

The Court of Appeal (Lord Alverstone M.R. and Collins L.J., Rigby L.J. dissenting) reversed this decision, and held that though the will did not contain the words "and legacies" in the description of "the residue and remainder," the testator intended the legacies to be paid out of the two mortgage debts, and that the will must be so construed.

The legatees of the two mortgage debts appealed.

Nov. 26. *Jenkins, K.C.*, and *Cann*, for the appellants, contended that the decision of the Court of Appeal was based upon a forced and unnatural construction and ought to be reversed.

Ingpen, K.C. (*Northcote* with him), for the respondent Dawson.

Theobald, K.C. (*Fischer Williams* with him), for the respond-

(1) *In re Grainger, Dawson* v. *Higgins*, [1900] 2 Ch. 756.

ents Grainger and Ramage, who represented the next of kin and the pecuniary legatees, contended that that decision was right, and, besides the cases there referred to cited, upon the question of the admissibility of extrinsic evidence, *Fonnereau* v. *Poyntz* (1); *Colpoys* v. *Colpoys* (2); *Boys* v. *Williams*. (3)

Nov. 28. EARL OF HALSBURY L.C. My Lords, I think your Lordships are very much indebted to Mr. Theobald and his learned junior for the very able and learned exposition of the principles upon which a will is to be construed in this country; but I confess that I have not been able to entertain the smallest doubt as to what is the true solution of the question propounded for your Lordships' determination.

Stated very narrowly—and I think the more narrowly stated the better—the question for determination on this particular will turns upon two phrases, or, even more compendiously stated, upon one phrase of the will: "All the residue and remainder of the sum of nine thousand one hundred and eighty-seven pounds, lent on mortgage to Sir John Lawson, the deeds being in the keeping of Messrs. Blount, Lynch & Petre, of Fitzalan House, Arundel Street, Strand, and of the sum of four thousand pounds, lent on mortgage to Mrs. Alicia Kirk, of the Park, Gorey, Ireland, the deeds being in the keeping of the same firm, after payment of my just debts and funeral expenses, and the expense of proving this my will."

Those are the words which your Lordships have to construe; and I confess that it is to my mind absolutely amazing that any one can entertain the smallest doubt as to what those words mean. I have read the words by themselves because, in my view of the meaning of this instrument, they are by themselves. One does not doubt that, where you are construing either a will or any other instrument, it is perfectly legitimate to look at the whole instrument—and, indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the

(1) (1785) 1 Bro. C. C. 472. (2) (1822) Jac. 451; 53 R. R. 42.
(3) (1831) 2 Russ. & My. 689; 34 R. R. 178.

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explanation of the particular clause that you are expounding. That is perfectly true as a general proposition; but I ask myself here what other words—what part of the will, what provision other than the one I am construing, reflects any light on, or gives the smallest interpretation to, the particular words which I am called upon to expound. If I am right in saying that there is no other part of the will that cuts down, qualifies, or in any degree alters the sense of the words I have read (and Collins L.J. himself says: "Read by itself and cut off from its context it is, I agree, capable of one meaning only"), then I ask myself what it is in the other part of the instrument to which the Lord Justice refers, by which he says the natural and ordinary and plain meaning of the words can be cut down and expounded into something different from that which he has himself said is their ordinary and natural meaning.

My Lords, in the course of the very learned and exhaustive argument, I have not heard one word quoted from any other part of the will which affects that question. What has been done (with the utmost respect I say it) by the then Master of the Rolls and the Lord Justice is to cut a sentence into two and to read the words "residue and remainder" as if they stood by themselves. Now, it has been said, and said very truly, that "residue and remainder" are relative terms; you cannot tell what they mean until you have found out in relation to what they are used. If, as Collins L.J. says, these words had been left by themselves and without an exposition of what they were to be read in relation to, there would have been considerable justice in the suggestion that you might read them as applicable to the residue of the whole estate after payment of its natural and just burthens. But that is not true; and all through the argument, in spite of repeated questions by me to the learned counsel, I found that in no one case would they read the words as they stand in the will, but they would read the words "residue and remainder" by themselves, and said, and said truly, that those are relative words. But when I come to look at the will itself, I must construe them as they stand in the context, and in their grammatical meaning, and with reference to what is there said; and then it seems

to me that the problem is solved without the smallest difficulty. The testator says, "all the residue and remainder" (now there the argument has stopped throughout over and over again, but that is not the way to read any sentence)—"all the residue and remainder of the sum of 9187*l.*"—and he repeats the same with reference to the second mortgage debt—"and of the sum of 4000*l.*," and so on. How is it possible to say that that language is susceptible of doubt?

The observations of very learned judges have been quoted to shew that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true. It is quite true that, where you are finding out persons or things—who are the persons designated by the will, what are the things left by the will—you may find either the person or the thing by proper external evidence of what is referred to. In the case cited, *Fonnereau's Case* (1), nothing could be more intelligible than this: a man leaves an annuity of so much; it has to be ascertained what he meant by it; the word "annuity" by itself means an annual sum, which, of course, might be a very large sum indeed; or you may find out that the testator possessed a thing which was called an "annuity," because it was the designation of it on the Stock Exchange; you may find out by external evidence what it was that he was referring to. Whatever the subject-matter of it is, you may, of course, find out by external evidence to what he refers. And here the odd thing is that the supposed ambiguous words which you are to construe are the words "residue and remainder," and yet, from first to last, the learned counsel have refused to refer to the words "residue and remainder" as they are used in the will. It is not "residue and remainder" absolutely; and that is the fallacy of the whole argument that has been addressed to your Lordships. It is residue and remainder of a particular thing, and you cannot cut the phrase in two and pretend that it becomes ambiguous because you cut the language in two and take one part of a phrase which is admittedly relative and treat it as if you could read it apart from the context in which

(1) 1 Bro. C. C. 472.

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it is, and the thing of which it purports to be the residue. And that is really the key to the whole of this matter.

My Lords, I have often said that to treat language with that violence and to say that you have arrived at the conclusion from external circumstances that the testator would have made a different disposition from what he has done if he had had the whole subject-matter in his mind, and, therefore, to construe his language differently, is not to construe or to interpret the language which the testator himself has used, but to make a will for him which you think he ought to have made if he had had the whole circumstances present to his mind.

Now, if I were to concede—what I certainly do not in this case, for I know nothing about it—that it is more probable that the testator would have treated the residue as being the residue of his whole estate and not of this particular sum of which it is stated to be the residue if he had had the facts and circumstances of his property before him—if I were to concede that, it would not help the present respondents, because, in the view I take, if you were to construe it with reference to any such question, it would be making a new will for him, and not construing the will which he has made.

In the case quoted here the day before yesterday—*Hunter* v. *Attorney-General* (1)—I find myself saying: "The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think your Lordships are not justified in taking such a liberty of interpretation. That certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money except something of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested he had in his mind, you can invent provisions and impose conditions which the testator himself has not introduced." I find that my noble and learned friend, Lord Davey, in the same case said: "I can only say, with unfeigned respect for the opinion of that learned judge"—

(1) [1899] A. C. 317.

referring to the Master of the Rolls—"that he seems to me to be making a will for the testator, and not interpreting the words he has used." "The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only." I say here—to paraphrase those words—the words are plainly applicable to the residue of the sums of money to which they are applied as a residue, and to that only. The language, therefore, is to my mind absolutely unambiguous.

My Lords, I confess I am confirmed in the view which I entertain of the true construction by the 24th section of the Wills Act. With whatever purpose, or in respect of whatever supposed defect in the law that section was enacted, I can only say that the language there seems to me plain and unambiguous—that I am to construe this will as if the condition of things to which it refers was that immediately before the testator's death. I do not believe that, for any such purpose as is now contended, you have any right to go into the history of the testator's property and see when he came into possession of it. My Lords, I say that by way of protest against the construction proposed to be placed upon that section of the Wills Act; but, for the purposes of this case, it is enough to say that I think that, in this particular will, the language is plain and unambiguous, and that for no such purpose as has been suggested to your Lordships could you go into external circumstances.

I am very clearly of opinion that the judgment of the Court of Appeal ought to be reversed, and I move your Lordships accordingly.

LORD SHAND. My Lords, I entirely concur with what has fallen from his Lordship on the Woolsack on the subject of the alleged ambiguity in this will. It appears to me, with great deference to those who have thought differently, that the will is unambiguous in itself. It is only ambiguous in this sense, that it has admitted of much argument on two different views of the construction of its terms, and not only of argument, but of very strong difference of opinion on the part of the learned judges in the Court of Appeal. But although that has been so,

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I agree with his Lordship in thinking that, in reference to the so-called ambiguity, the meaning of the testator, on a sound construction of his will, is that the deductions to be made from the residue therein described are only the debts, funeral expenses, and the expense of proving his will. He has, in my opinion, expressly stated that these are to be the only deductions from the residue. I agree with my noble and learned friend on the Woolsack that the "residue" to which the testator there refers, according to the plain language of the instrument, is the residue and remainder of the sums then lent upon mortgages, and of those sums only.

It appears to me, my Lords, that it is a violent construction of this will to treat the word "residue" as referring to the residue of the testator's general estate, or because of the order in which the clauses occur to hold that the residue of the mortgages is to be taken after deduction of the legacies, which are not mentioned as deductions to be made in the clause which specifies what the deductions are to be. I agree with Stirling L.J. that what is really proposed is to read in the word "legacies" in the clause specifying deductions. I can find no warrant for this, or anything to suggest that legacies were to form a deduction from the residue of the mortgage debts.

My Lords, I must further say that I have very great difficulty indeed as to whether any such proof as has been allowed and has been so much referred to in the argument is admissible in this case. The case is not one in which either the property dealt with by the testator or the legatees or persons to be benefited by the will are at all doubtful. In the class of cases in which you cannot tell exactly what is given, or to whom it is given, because of obscure and doubtful expressions of the testator's will in regard to the particular conditions of his property, you must have recourse to extrinsic evidence in order to ascertain his meaning. But here, in the first place, the will is, in its expressions and language, as I think, unambiguous, and, that being so, no proof in reference to the amount of the testator's estate at the date of the will can affect its construction. It appears to me that the purpose, or the effect, at all

events, of the proposal to lead evidence in this case, is to supply a basis for inferring the intention of the testator, and to take one away from the true construction of the will as shewing that the testator intended something different from what he has said. I agree with his Lordship in thinking that even if it could be shewn that the intention of the testator was something different from the language of the will, that intention would not prevail, but that the language of the will must settle the rights of parties. The object of shewing that there was a deficiency in the assets dealt with by the will as a whole is really to affect this question of intention, and I would observe that if, in order to place the Court entirely in the position of the testator when he made his will, it is competent to lead evidence as to the amount of his estate at that date, it must, I think, be equally competent to lead counter evidence in order to shew that, although his estate was of that amount, he had great expectations that his estate would be considerably larger in the course of a few days or a few years during which he expected to live. The one class of evidence must be admitted as a counterpoise to the other. But the importance of such evidence and its real effect can be of very little consequence, if any, because of the provision in the Wills Act to which his Lordship has just referred, to the effect that under the statute the will speaks as at the date of the death, and the amount and nature of the estate must be regarded as at that date, and not at a date three or four years before, when the estate might have been different altogether. On these grounds I am entirely of opinion with the Lord Chancellor that the judgment ought to be as his Lordship has proposed.

LORD DAVEY. My Lords, notwithstanding Mr. Theobald's very able argument, I cannot bring myself to feel any doubt as to the construction of this will, nor do I think that any case has been made by the respondents for the admission of extrinsic evidence for the purpose of enabling us to construe it. On both those points I am quite satisfied with the judgment delivered by Rigby L.J. in the Court of Appeal, and I adopt the reasons which he has given. I need not, therefore, make

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any lengthened observations upon the case; but I wish in particular to call attention to two passages in the judgment of that learned Lord Justice. He says this (1): "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd ed. pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise, there probably were, and subsequently there possibly may have been, instances of the kind: all such instances, however, must be attributable to the result of an unconscious, though illegitimate, yielding to almost necessary bias in favour of a particular intention, indicated or suggested by extrinsic facts, as distinguished from the explanatory effect of such facts on the words of the will under discussion." The learned Lord Justice adds in a later passage: "It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction; it is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it"—I will add what is apparently the meaning of the Lord Justice—without some explanation of the expressions used in it which are descriptive of the subjects of the bequests or of the persons to whom the bequests are made.

My Lords, like Rigby L.J., I will not undertake to say that no case is to be found (I do not pretend to have made an exhaustive search, but I am not aware of any case) in which extrinsic evidence has been admitted to enable the Courts to

(1) [1900] 2 Ch. 763, 764.

construe a difficult will where the words themselves require no interpretation, but the difficulty is only in the construction of the sentence in which the words occur. The cases cited by Mr. Theobald do not appear to me to bear a contrary character. They were all cases where the question was as to the meaning of an indefinite or uncertain description of persons or things.

And, my Lords, to admit such evidence as has been tendered in this case would, in my opinion, be contrary to s. 24 of the Wills Act, which bids us construe a will as if it were made immediately before the testator's death. Not only would it be contrary to that section, but in my opinion it would also be contrary to the general principles which guide the Courts in the construction of wills and of other instruments as well.

My Lords, I have already said that the gift in this will does not, in my opinion, present any difficulty of construction. No doubt the word "residue" is in itself a relative term; but in this case the testator has himself told us the meaning in which he uses the word "residue," and the subject-matter with reference to which the word "residue" is used, namely, it is to be the residue of the mortgage debts, after the payment of debts and funeral and testamentary expenses. Am I to change my opinion of the meaning of those words, which I think very plain, because I know that at the time when he made his will the mortgage debts formed the bulk of his property? I think not. Nor do I think I ought to admit that consideration to influence my opinion merely because other persons as well qualified, or better qualified than myself, have attached a different meaning to those words. It may be that the testator may have been imperfectly acquainted with the use of legal language; he may not have understood the legal effect of making a specific gift or what a specific gift was, and he may have used language the legal interpretation of which does not carry out the intentions that he had in his mind. I do not know whether that is so or not. But, whether that be so or not, of this I am quite clear, that that fact should not induce the Court to put a meaning on his words different from that which the Court judicially determines to be the meaning which they bear.

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My Lords, the difficulty which arises from departing from this plain, simple and well-founded rule of construction is illustrated by this very case. The consequence of holding that the words "residue after payment of" "debts and funeral" and testamentary expenses mean something different from what the testator has said has led to this extraordinary result—that the Court has felt itself constrained, having put that unnatural meaning upon the words which the testator has used, to determine that legacies which are primâ facie mere pecuniary legacies of 100*l.* or more—there are several pecuniary legacies of 100*l.*, 150*l.*, 1000*l.*, 750*l.*, and so forth—that those legacies, which are expressed in language as to the meaning of which no lawyer could possibly have any doubt, are to be held to be specific—that is, to be not what they say, a gift of 100*l.*, but a gift of an aliquot portion of a mortgage debt. My Lords, that is only an illustration of the danger of departing from what has been sometimes called the golden rule of construing every instrument according to the natural meaning which the words bear in the instrument in which you find them.

I am, therefore, of opinion with your Lordships that the judgment of the Court of Appeal should be reversed and the judgment of Stirling J. restored.

LORD BRAMPTON. My Lords, I so thoroughly concur in every word that was said by the Lord Chancellor in giving judgment just now, that I do not feel that I could usefully add one single word. His reasons for the judgment at which the House has arrived seem to me to be not only sound law, but extremely good sense. Therefore, I satisfy myself by concurring with that judgment. I think the judgment of Stirling J. ought to be restored and the judgment of the Court of Appeal reversed.

LORD ROBERTSON. My Lords, I understand and respectfully appreciate the view taken of this will in the Court of Appeal and ably supported by the learned counsel for the respondents. But I am entirely unable to see ambiguity in this will, for I find the subject of the gift to the canons to be expressly defined

in the words of the gift. I can see no relation in the word "residue" to the prior legacies. I see a direct relation to the debts, funeral expenses, and the expense of proving the will.

Order of the Court of Appeal reversed save in so far as it affirmed the order of Stirling J.; Declared, that upon the true construction of the testator's will his undisposed of personal estate was liable for the payment of his debts and funeral and testamentary expenses, and the pecuniary legacies and annuity bequeathed by his will in exoneration of the specifically bequeathed mortgage debts: And it appearing that the undisposed of personal estate was insufficient for the payment of the testator's funeral and testamentary expenses and debts, and the pecuniary legacies and annuity, and the appellants agreeing that such deficiency should be made good out of the specifically bequeathed mortgage debts: And disclaiming all right to be recouped out of the specifically devised real estate; Ordered, that the costs of all parties in the Chancery Division and in the Court of Appeal (including the costs directed by the order of the Court of Appeal to be paid by the appellants), and also the costs of all parties incurred in respect of the appeal to this House, be paid out of the undisposed of personal estate: Cause remitted to the Chancery Division.

Lords' Journals, November 28, 1901.

Solicitors: *Withalls & Belton; Blount, Lynch & Petre; Collyer & Davis.*

[Referred to. In re] HATCH. [1948] Ch. 592

Rule in, applied. Re HATCH (decd.). [1948] 2 All E.R. 288.

[HOUSE OF LORDS.]

H. L. (E.) 1901 Dec. 16.

HANCOCK AND OTHERS . . . . . APPELLANTS;

AND

WATSON AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Absolute Gift—Gift over on a Compound Event—Executory Devise—Perpetuity—Remoteness—Splitting Gift over—Cutting down Absolute Gift—Settlement—Intestacy.

A will made in 1850 gave residuary personal estate to trustees in trust for the testator's wife for life and after her death (which happened) to be divided into five portions which the testator allotted thus: "To S. D. (a married woman) I give two of such portions" and directed that the two-fifths allotted to S. D. should remain in trust for her life for her separate use, and from and after her decease in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marriage if daughters; "but in default of any such issue" the two-fifths to be divided among the children of C., payable to sons at twenty-five or to daughters at twenty-one or marriage.

S. D. died without having had a child. At her death there were children of C., daughters, who had all attained twenty-one or married:—

Held, (1.) that the whole gift over on the death of S. D. was void for remoteness, and could not be split up into separate contingencies so as to be construed as a gift over on one contingency, that of S. D. having no child; and (2.) that upon the death of S. D. there was no intestacy as to the two-fifths, but that by reason of the invalidity of the gift over on her death, the original absolute gift remained, and upon her death passed to her representatives.

Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be.

The decision of the Court of Appeal, [1901] 1 Ch. 482, affirmed.

THE words of the will and the events which happened are stated in the judgment of Lord Davey. The appellants represented the children of C. and the testator's next of kin. The respondents represented the executors of S. D. and the trustees under the testator's will.

Nov. 29; Dec. 2. *Levett, K.C.*, and *R. J. Quin*, for the appellants. The gift over of Susan Drake's two-fifths is sever-

able into two distinct gifts—first, a gift over in the event of her dying without having had any child, and, secondly, of her having had children, none of whom fulfilled the prescribed conditions. The alternative limitations need not be separately expressed. This divisibility is recognised in a similar case in *Evers* v. *Challis* (1): see per Lord Wensleydale. (2) Where a gift fails as an executory devise, it may be good as a contingent remainder. The gift is to be construed as if the words were inserted "If Susan Drake should have no children" before those descriptive of the further events. See per Lord Campbell, citing *Jones* v. *Westcomb* (3): "If there be a gift over on a class dying within a particular age, it takes effect if that class never comes into existence": *Doe* d. *Evers* v. *Challis*. (4) Lord Campbell's judgment was restored in the House of Lords after reversal in the Exchequer Chamber. These decisions were followed in *Watson* v. *Young* (5) and *In re Harvey*. (6) *In re Bence* (7) is distinguishable. Further, Susan Drake took no more than a life interest, and, if the gift over is void for remoteness, her two-fifths share passed to those who were the testator's next of kin at his death.

Haldane, K.C., and *Mulligan, K.C.* (*Fawcus* with them), for the respondents other than the trustees. The doctrine of *Evers* v. *Challis* (1) is confined to real estate, and *Watson* v. *Young* (5) is overruled by *In re Bence*. (7) The gift to Susan Drake is clearly absolute in the first instance, and the gift over is to a class on a contingency which is void for remoteness. There is only one event—not two alternative events; and there is abundant authority to shew that such a gift cannot be interpreted so as to receive effect if the event actually occurs within the limit. It is enough to render it void that it may exceed the period: *Miles* v. *Harford* (8); *Proctor* v. *Bishop of Bath and Wells*. (9) In the events which have happened, Susan Drake's representatives are entitled, the gift having in the first

(1) (1859) 7 H. L. C. 531.
(2) 7 H. L. C. at p. 552.
(3) (1711) 1 Eq. C. Ab. 245.
(4) (1850) 18 Q. B. 224, 230.
(5) (1885) 28 Ch. D. 436.
(6) (1888) 39 Ch. D. 289.
(7) [1891] 3 Ch. 242.
(8) (1879) 12 Ch. D. 691.
(9) (1794) 2 H. Bl. 358; 3 R. R. 417.

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instance been absolute, and the restrictions on the mode of enjoyment having failed: *Kellett* v. *Kellett*. (1)

P. S. Stokes, for the trustees.

Levett, K.C., in reply.

The House took time for consideration.

Dec. 16. LORD DAVEY. My Lords, in this case Richard Hancock, by his will dated June 17, 1850, gave the residue of his property to trustees upon trust to permit his wife (who died in November, 1876) to receive the income during her life for her separate use, and after her death upon trust to be divided into five equal portions, which he allotted in the manner following: To Susan Drake he gave two of such portions, to his brother William one such portion, to his brother Charles one such portion, and to the sons of his late brother Sampson the remaining one such portion. The will then proceeds as follows: "But it is my will and mind that the two-fifth portions allotted to the said Susan Drake shall remain in trust, and that she be entitled to take only the interest and annual proceeds of the shares so bequeathed to her during her natural life, and for her sole and separate use independent of her present or any future husband, but without power of anticipation, and from and after her decease in trust for the benefit of any child or children born unto her the said Susan Drake by her present or any future husband upon his or their attaining the age of twenty-five years, if a son or sons, or if a daughter or daughters upon her or their attaining the age of twenty-one years, or upon her or their marriage, whichever of these events may first happen; but in default of any such issue, then and in that case the said two-fifths of my residuary estate and any accumulation of interest thereon shall go and be divided subject to the appointment of my wife among the children of my brother Charles; but if there be no such appointment, then to be equally divided among such children, payable if a son or sons upon their attaining the age of twenty-five years, and if a daughter or daughters upon her or their attaining

(1) (1868) L. R. 3 H. L. 100.

the age of twenty-one years, or upon her or their marriage, whichever event may first happen."

The testator's widow made no appointment of the two-fifths allotted to Susan Drake. Susan Drake died on June 26, 1899, without ever having had any issue. The two-fifths of the testator's residuary estate allotted to her are now represented by a sum of 12,399*l.* 10*s.* Reduced 3 per cent. Annuities.

The appellants are the children of the testator's brother Charles, and in the events which have happened they claim to be entitled to Susan Drake's two-fifths of the residuary estate under the gift over stated above. They are also next of kin of the testator; and if they fail on their first point they contend that the share in question is undisposed of.

Your Lordships will observe that the disposition under which the appellants claim is an executory limitation, to take effect in default of such issue as mentioned of Susan Drake, i.e., her children, whether born before or after the testator's death, who shall attain the age of twenty-five years in the case of sons, and twenty-one years or be married in the case of daughters. This event may, of course, happen beyond the limits allowed by law.

An executory devise is an infringement on the rules of the common law, and the conditions for its validity are well settled. So far back as the year 1787 Lord Kenyon, then Master of the Rolls, thus expresses himself in *Jee* v. *Audley* (1): "The general principles which apply to this case are not disputed; the limitations of personal estate are void unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the Duke of Norfolk's case to the present; it is grown reverend by age, and is not now to be broken in upon." And in advising this House in *Dungannon* v. *Smith* (2), a case to which I shall refer again, Cresswell J. stated the rule thus: "It is a general rule, too firmly established to be controverted, that an executory devise to be valid must vest, if at all, within a life or lives in being and twenty-one years after; it is not

(1) (1787) 1 Cox, 324; 1 R. R. 46. (2) (1846) 12 Cl. & F. 546, at p. 563.

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sufficient that it may vest within that period; it must be good in its creation, and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so."

All this is not disputed by the appellants; and it would therefore seem that the gift over to the children of Charles in the will before your Lordships must primâ facie be held void. But the appellants contend that they are entitled to look at the events which happened, and to construe the event on which the gift over is to take effect as if it were two events. They say that the meaning of the testator's words rightly construed is: "if Susan Drake shall have no issue, or if her children die without having fulfilled the prescribed conditions for the vesting of the property in them." In the first case they say the gift is good, and in the second only is it void.

My Lords, the first observation that occurs to one is that this is not the language of the will. The learned counsel for the respondent pointed out grammatical difficulties in reading the words in that way. If one were at liberty to alter the language of the will in the manner suggested, I really do not see why one should not split the event into as many contingencies as can be pointed out in which the gift over would take effect within the allowed limits. For instance, why not divide the event in the present case into at least three: (1.) If Susan has no children; (2.) if her children all die under twenty-one; or (3.) if they die under twenty-five? And there may be other contingencies into which the event could be broken up. In that case, what becomes of the rule that you are not to look at the event which actually happens for determining the validity of the gift? I again quote Lord Kenyon. "Another thing pressed upon me," he says, "is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not I cannot make it so."

But, my Lords, the same argument which has been pressed

upon your Lordships was addressed to the Court of Common Pleas more than a hundred years ago and overruled. In the case of *Proctor* v. *Bishop of Bath and Wells* (1), decided in the year 1794, an advowson was devised to the first or other son of Thomas Proctor that should be bred a clergyman, and be in holy orders, but in case Proctor should have no such son, to one Moore in fee. There being no particular estate to support the devise as a contingent remainder, it could take effect only as an executory devise. Proctor died without having had a son, and Moore thereupon claimed to present. It was argued that the limitations in the will were alternate: if Proctor should have a son in holy orders Moore was excluded, and if he had no son he could take. It was replied that in truth there was but one contingency on which the devise to Moore was limited, and the case was distinguished from a case of *Longhead* v. *Phelps* (2), where two contingencies were expressed in the disjunctive, the first of which was good. The Court of Common Pleas was very clearly of opinion that the first devise to the son of Thomas Proctor was void from the uncertainty when such a son, if he had any, might take orders, and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided.

Again, in *Dungannon* v. *Smith* (3) a testator bequeathed leaseholds for years to trustees on trust for B. for life, and after his death to permit such person, who for the time being would take by descent as heir male of the body of B., to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person so attaining that age. Your Lordships will observe that there was no gift of the corpus of the estate except in the direction to convey, and the event upon which that was to take place might exceed the limits allowed by law. At the death of B. his son and heir had attained twenty-one. It was argued on his behalf that you might split the gift into two parts, and construe it as a direction to convey to the first heir

(1) 2 H. Bl. 358; 3 R. R. 417. (2) (10 Geo. 3) 2 W. Bl. 703.
(3) 12 Cl. & F. 546.

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male on his attaining twenty-one, which would be good, and in default of his doing so to the successive heirs male. This argument was in principle and substance precisely that put forward by the appellants in the present case. I will quote only the opinion of Maule J., one of the learned judges who advised the House. He says (1): "With respect to this argument it may be observed that the words of the testator are clear and unambiguous. There is no difficulty in dealing with them as they stand in the will unless it be sought to evade the rule against perpetuity. There is no such rule of construction as that any words which point out the same course of devolution" (I pause to add "or describe the same events") "as those used by the testator may in construing a will be substituted for those which he has used, a proposition which seems to be assumed in the argument in question. Such a rule would be manifestly inconsistent with the established law that a gift to take effect on an event which may happen or may not happen within the legal limit is too remote, such a gift being always capable (consistently with the same order of devolution) of being divided into two gifts, one necessarily to take effect, if at all, within the legal time, and the other afterwards."

I will not delay your Lordships by quoting what was said by the noble and learned Lords to the same effect in giving judgment, because I do not find the point more clearly put than it was by Maule J.

The appellants, however, rely on another case in this House of *Evers* v. *Challis*. (2) On a superficial view of this case it appears to lend some support to their argument; but on a careful examination it will be found to have been decided on a totally different point, which has no application to the present case. The will in *Evers* v. *Challis* (2) contained a very complicated series of devises of a freehold estate. It is sufficient for the present purpose to say that there was a devise to the testator's daughter Ann for life with remainder to her children, if sons, living to attain twenty-three, and if daughters, living to attain twenty-one, with a gift over under

(1) 12 Cl. & F. at p. 579. (2) 7 H. L. C. 531.

which the appellant claimed, Ann having died childless. As an executory devise the gift over was admittedly too remote, but it was argued that it took effect immediately on Ann's death as a contingent remainder. It is a familiar principle of English real property law that if a devise can take effect as a remainder it shall do so, and it was accordingly held in this House that the gift over, in the event which had happened, operated and took effect as a contingent remainder, and the question of remoteness, therefore, did not affect it. That this was the point decided is clear from the opinion of the judges who were called in to assist this House, delivered by Wightman J., as well as from the judgments delivered by the noble and learned Lords who heard the case. Wightman J. said: "No case or authority has been cited to shew that where a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression, and our opinion does not at all conflict with the authority of the cases of *Proctor* v. *Bishop of Bath and Wells* (1) and *Jee* v. *Audley* (2), in neither of which cases was it possible for the limitation over to operate as a remainder."

Lord Cranworth said: "I think that the gift to the children of John and Sarah on the death of Ann without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good because when the particular estate determined the contingency on which the remainder was to take effect had happened." And he supports his opinion by reference to a case of *Gulliver* v. *Wickett* (3), which he discusses at some length.

Lord Brougham said: "As to the cases, of which there are several, I need not go into them. One of them is *Proctor* v. *Bishop of Bath and Wells*. (1) In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise."

On these grounds this House reversed the decision of the Exchequer Chamber and restored that of the Queen's Bench.

(1) 2 H. Bl. 358; 3 R. R. 417. (2) 1 Cox, 324; 1 R. R. 46.
(3) (1745) 1 Wils. 105.

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It is apparent that the authority of *Proctor* v. *Bishop of Bath and Wells* (1) is untouched by anything decided or said in *Evers* v. *Challis*. (2)

I am, therefore, of opinion that the appellants fail on their first point. Some minds may be disposed to sympathise with Sir William Grant when he says (3): "Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess where that excess could, as in this case it can, be clearly ascertained." But the law is what it is.

The appellants' second point is that the two-fifths allotted to Susan Drake on failure of the gift over goes to the next of kin of the testator, and not to Susan's representatives as declared by the Court of Appeal. I confess to some surprise at hearing this point treated as arguable. For, in my opinion, it is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (4), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to Susan Drake was in terms an absolute gift to her. The testator uses the words "I give," and speaks of the shares subsequently as "allotted" to her. Mr. Levett contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said: he has directed that

(1) 2 H. Bl. 358; 3 R. R. 417.
(2) 7 H. L. C. 531.
(3) (1817) *Leake* v. *Robinson*, 2 Mer. 362, 389; 16 R. R. 168.
(4) (1849) 1 Mac. & G. 551.

during her life she shall have only the income of her share for her separate use without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death so far as it should not be exhausted by the trusts declared of it and with the right of her representatives to claim it. In other words, as between herself and the estate there is a complete severance and disposition of her share so as to exclude an intestacy, though as between her and the parties taking under the engrafted trusts she takes for life only.

I am of opinion the appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD SHAND. My Lords, I have had an opportunity of fully considering in print the opinion of my noble and learned friend Lord Davey, and I concur in the judgment and in all that his Lordship has said. I shall only add that, on the points raised in the appellants' argument, the authorities to which my noble and learned friend has referred seem to me to be conclusive against the appellants' argument in all its bearings.

LORD BRAMPTON. My Lords, I entirely concur.

LORD ROBERTSON. My Lords, I concur.

EARL OF HALSBURY L.C. My Lords, I concur, and I have only to say that I think that on both points the matters argued before your Lordships are so fully covered by the authorities that I do not think it necessary to add anything to what my noble and learned friend Lord Davey has said.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 16, 1901.

Solicitors: *Wadeson & Malleson; Bone & Heppell.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 Dec. 17.

NOAKES & CO., LIMITED . . . . . APPELLANTS;

AND

RICE . . . . . RESPONDENT.

Mortgage—"Once a Mortgage always a Mortgage"—"Clog" on Redemption—"Tied" Public-house—Mortgage of Leasehold Public-house—Covenant by Mortgagor to take Beer during the Term from Mortgagee only.

In a mortgage of a leasehold public-house by a licensed victualler to brewers the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not during the continuance of the term, and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees:—

Held, that this covenant was a "clog" on the equity of redemption, and that the mortgagor, on payment of all that was due upon the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the "tie."

Santley v. *Wilde*, [1899] 2 Ch. 474, commented on.

The decisions of Cozens-Hardy J., [1900] 1 Ch. 213, and the Court of Appeal, [1900] 2 Ch. 445, affirmed.

THE respondent, a licensed victualler, in 1897 bought a public-house held under a lease expiring in 1923. Before the purchase the appellants, who were brewers, had a mortgage on the house with a covenant similar to the one now in question. The appellants released their security to enable the second mortgagees to sell the house. The respondent not being able to find all the purchase-money, part was advanced by the appellants upon a mortgage by the respondent of the leasehold premises, goodwill, &c., subject to a proviso that if the respondent should pay all the moneys and interest due on the security the appellants should surrender or re-convey the premises to the respondent or as he should direct. In the mortgage deed the respondent covenanted, in the terms more fully set forth in both the reports below (1), to the effect that, so as to charge the premises into whosesoever possession they might come,

(1) [1900] 1 Ch. 213; [1900] 2 Ch. 445.

and to the intent that the obligation of the covenant might run with the land, the respondent would not at any time during the continuance of the term, whether any money should or should not be owing on the security, use or sell upon the premises any malt liquors except such as should be purchased by the respondent of the appellants.

The respondent being desirous to pay off all money due on the security and to obtain a reconveyance or transfer, with a release from the covenant in question, brought an action against the appellants, claiming a declaration to that effect.

Cozens-Hardy J. made an order declaring that upon payment by the respondent to the appellants of all moneys due, the respondent was entitled to a reconveyance of the property together with a release of all covenants contained in the mortgage, or at his option to have the property transferred to a transferee with the benefit of all covenants contained in the mortgage; and that in either case the appellants were not thereafter entitled to the benefit of the covenant in question. This order was affirmed by the Court of Appeal (Lord Alverstone M.R., Rigby and Collins L.JJ.).

The respondent appealed.

Dec. 9, 10. *Haldane, K.C.*, and *Eve, K.C.* (*Stanley Fisher* with them), for the appellants. The question is whether the bargain which the parties have voluntarily made with each other is valid. It is alleged that two equitable doctrines have been infringed—the first directed against "clogging" the equity of redemption, and the second against obtaining an unconscionable collateral advantage. These doctrines are laid down in full rigour in *Jennings* v. *Ward* (1), but modified in *Bunbury* v. *Winter*. (2) If a collateral advantage is not oppressive, it will be enforced. That is the deduction to be drawn from *Bunbury* v. *Winter*. (2) In *Mainland* v. *Upjohn* (3) a collateral advantage or bonus was enforced, and Kay J.'s decision was approved in *Biggs* v. *Hoddinott*. (4) The whole question is the reasonableness of the bargain: and the substance, not the

(1) (1705) 2 Vern. 520.
(2) (1820) 1 Jac. & W. 255; 21 R. R. 159.
(3) (1889) 41 Ch. D. 126.
(4) [1898] 2 Ch. 307.

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form, will be regarded. There must be some right to redeem, and there can be no clog on that right as defined in the deed. But conditions can be added, and there can be no difference whether they take the form of addition to what is paid by the mortgagor, or deduction from what is restored by the mortgagee: *Potter* v. *Edwards*. (1) *Santley* v. *Wilde* (2) was based on *Biggs* v. *Hoddinott* (3) and was an extension of it. In fact, it is an almost exact parallel with the present case: the mortgage debt was to be paid, and also a share in the profits of a theatre. In *Carritt* v. *Bradley* (4) there was a stipulation which was held to be reasonable, requiring the mortgagor "always thereafter" to employ the mortgagee as his agent. Thus the old equitable doctrines have been developed and qualified in accordance with modern needs. The old lawyers would never have recognised a mortgage for a term of years; they would have regarded it as an attempt to create an irredeemable pledge. The recent authorities go to this length—that a mortgagee could enforce a covenant for a perpetual rent-charge after the mortgage was paid off. Jessel M.R. in *Wallis* v. *Smith* (5) says: "It is of the utmost importance as regards contracts between adults . . . . that the Courts of law should maintain the performance of the contracts according to the intention of the parties . . . . I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character." In *Salt* v. *Marquis of Northampton* (6) the only question was whether the policy moneys formed part of the mortgage security.

Astbury, *K.C.*, and *E. Beaumont*, for the respondent. There is no case in the books of a proviso for redemption where the property on reconveyance was to be less than that which was mortgaged. The collateral agreement is unconscionable in the extreme. The property mortgaged was a free house; it is to be reconveyed a tied house. The money might be called in at any time by the mortgagee, and the mortgagor would still be bound to purchase his liquor from the mortgagee. Con-

(1) (1857) 26 L. J. (Ch.) 468.
(2) [1899] 2 Ch. 474.
(3) [1898] 2 Ch. 307.
(4) [1901] 2 K. B. 550.
(5) (1882) 21 Ch. D. 243, 266.
(6) [1892] A. C. 1.

sequently he would be unable to borrow from any one else, for no brewer would lend money on a house tied to another brewer. *Santley* v. *Wilde* (1) is the only case which resembles the present; but the collateral obligation was not to last after payment of the mortgage debt, and the profits were part of the consideration. The case was treated as a corollary to *Biggs* v. *Hoddinott*. (2) In neither was there to be a continuing benefit to the mortgagee after redemption. In the latter case there was the recognised stipulation that the loan was to be for five years. A claim to redeem before that time would have been demurrable. This appeal is governed by *Salt* v. *Marquis of Northampton* (3), where, as soon as it was held that the policy of insurance was part of the mortgage, the right to redeem attached, without any clogging conditions.

The question has not been argued whether damages were recoverable by the appellants even if the covenant could not be enforced. But there can be no severance of the covenant: if it is invalid at all, it must be invalid in all.

Haldane, K.C., in reply, contended that the property mortgaged was a tied house, and therefore that on redemption the property reconveyed was subject to the tie.

The House took time for consideration.

Dec. 17. EARL OF HALSBURY L.C. My Lords, in this case it is suggested that great differences of judicial opinion are apparent upon many of the decisions which are germane to the present appeal. For my own part, I very much doubt whether it is quite accurate so to describe the differences of judicial opinion. In many of the cases, and indeed I think in most of the cases to which our attention has been drawn, the Court has not been in any doubt or difficulty as to the rule, which has been established in the Courts of Equity so firmly that nothing could shake it now, but only as to the application of that rule to different sets of facts.

It is to my mind a very remarkable corroboration of the

(1) [1899] 2 Ch. 474. (2) [1898] 2 Ch. 307.
(3) [1892] A. C. 1.

H. L. (E.) 1901 NOAKES & Co., LIMITED v. RICE. Earl of Halsbury L.C.

criticism which I am now making that in that case, upon which doubt appears to have been thrown, namely, that of *Santley* v. *Wilde* (1), my noble and learned friend Lord Lindley's judgment is in these terms—and I do not know that there has been a more authoritative exposition of the rule which arises now than what my noble and learned friend there laid down: "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt, or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this that 'once a mortgage always a mortgage,' but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation, the payment or performance of which is to be secured, is a clog or fetter within the rule."

My Lords, I cite that case because it appears to me that that lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact or of the modes in which the various Courts have regarded the fact, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which my noble and learned friend laid down in the case which I have cited that has been the subject of doubt or difficulty in any Court whatever.

My Lords, I find that the same question has arisen and has been very learnedly discussed in the Irish Courts lately, in the case of *Browne* v. *Ryan* (2), and certainly that case is extremely relevant to the question which your Lordships are now discussing, because in truth it arose upon what practically are the facts of this case, and the learned judges in the Court of Appeal

(1) [1899] 2 Ch. 474. (2) [1901] 2 I. R. 653.

have arrived at the same conclusion as that at which I invite your Lordships to arrive. FitzGibbon L.J. in his judgment (and also Holmes L.J.), in referring to the case which I have just cited, appears to consider that that case is inconsistent with the rule which they themselves lay down. I confess I am unable to find any inconsistency. It may be that my noble and learned friend Lord Lindley took a different view of the facts in the case to which he was then referring from that which they would have taken, but that is not a difference in the law; and in this case it appears to me, as in the case which was argued in the Court of Appeal in Ireland, it is almost impossible, if the rule laid down by Lord Lindley there is the rule upon which the Courts must act, to deny that there is here a fetter or clog, or whatever figurative word may be used, to prevent that which, according to the known state of the law, is to be enforced, namely, that the person who has pledged his estate for the payment of a debt shall, upon redemption, be entitled to have that estate back again unfettered and unclogged by anything that shall prevent his exercising the right which the law insists upon his being permitted to have.

Under these circumstances, my Lords, it is and must be in each case a question of the particular thing which is advanced as a clog or a fetter, and in some cases it may seem to come very near the line. Whatever rule is laid down one can reduce it to something like an absurdity by taking an extreme case. But, my Lords, taking this case, it appears to me that undoubtedly this was a mortgage, and that the equity of redemption is clogged and fettered here by the continuance of an obligation which would render this house less available in the hands of its owner during the whole period and beyond the whole period of the term, apart from the realization of the security. Under those circumstances, as a matter of the merest and simplest reasoning, I am wholly unable to come to any other conclusion than that there is a clog and fetter here which the law will not permit.

That seems to me, my Lords, to be the whole of this case, and, apart from the attempt to determine the sources from which this rule of law or equity was arrived at, it seems to me

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that this case is capable of being disposed of very summarily in that way. I care not what the sources of the rule were—I care not what difference of fact there may have been in other cases—what I say is, here is a case strictly within the rule, and looking at the facts of this case and applying to it one's ordinary knowledge of what would be the effect upon the property which was made the pledge, and which has to be restored free and unfettered to its owner, I cannot entertain a doubt that this did, and did intentionally, place a clog and fetter upon the right of redemption which it is the policy of the law as announced by the Courts of Equity to insist shall not be taken away by anything in the nature of a mortgage.

Under these circumstances, I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of opinion that the judgment of Cozens-Hardy J., affirmed by the Court of Appeal, is perfectly right.

Redemption is of the very nature and essence of a mortgage, as mortgages are regarded in equity. It is inherent in the thing itself. And it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.

In the present case it is hardly necessary to appeal to this principle. The mortgage deed under consideration expressly and in terms provides that on repayment of the money advanced the mortgagees are to reconvey the mortgaged premises to the mortgagor, or as he shall direct. That, of course, means that the land is to be reconveyed freed and discharged from all burthen and liability in respect of or arising out of the contract under which the advance was made.

Mr. Haldane, in his reply, felt the difficulty of his position so much that he was driven to contend that the subject of the

security was a "tied" public-house, and that, therefore, the mortgagor could only get back his property subject to a pre-existing "tie" in favour of the brewers. But to this, as was pointed out in the Court of Appeal, there are two answers. In the first place, the argument has no foundation in fact. Nothing can be plainer than this, that it was the object and intention of all parties that the property should be set free from the old "tie" attached to it in the hands of its former owner, and that it should be mortgaged to the appellants as a free public-house. In the next place, if the tie is invalid after redemption now, the old tie could not have subsisted after the former mortgage was paid off.

Since the argument, my attention has been called to the case of *Browne* v. *Ryan* (1), recently decided by the Court of Appeal in Ireland. There a farmer mortgaged his holding to secure 200*l.* and interest; and, as part of the mortgage transaction, it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to any one else. The Court of Appeal held, and, in my judgment, rightly held, that the stipulation had no effect after redemption. The judgments of the learned judges in the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley* v. *Wilde* (2), and they expressed their disapproval of the conclusion at which the English Court arrived. My Lords, speaking for myself, with all deference to my noble and learned friend opposite, Lord Lindley, I cannot help sharing that view. I do not in the least dissent from the propositions laid down by my noble and learned friend, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money, with a superadded obligation offending against the settled principles of equity, in that it rendered redemption impossible. It seems to me to be contrary to principle that a

(1) [1901] 2 I. R. 653. (2) [1899] 2 Ch. 474.

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mortgagee should stipulate with his mortgagor that after full payment of principal, interest, and costs, he should continue to receive, for a definite or an indefinite period, a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the President of the Probate Division, who appears to have thought that *Santley* v. *Wilde* (1) was covered by the decision in *Biggs* v. *Hoddinott* (2), a decision to which, as it seems to me, no objection can be taken.

If there is an expression in Cozens-Hardy J.'s judgment to which I do not cordially assent, it is one in the last paragraph but one of his judgment, where the learned judge seems to refer to this tie as "an equity attached to the property," or as an "equitable burden." I rather doubt whether such an obligation can be made to run with the land or can be imposed on the owner in respect of the property except as between lessor and lessee, or, in the case of a mortgage, during the continuance of the security.

I concur in thinking that the judgment should be affirmed.

LORD SHAND. My Lords, I am of the same opinion. For the reasons stated by Cozens-Hardy J., by the Court of Appeal, and by your Lordships, I am of opinion that the judgment appealed from should be dismissed.

LORD DAVEY. My Lords, there are three doctrines of the Courts of Equity in this country which have been referred to in the course of the argument in this case. The first doctrine to which I refer is expressed in the maxim, "Once a mortgage always a mortgage." The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void.

My Lords, the first maxim presents no difficulty: it is only another way of saying that a mortgage cannot be made

(1) [1899] 2 Ch. 474. (2) [1898] 2 Ch. 307.

irredeemable, and that a provision to that effect is void. In the case of the *Marquis of Northampton* v. *Salt* (1) the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed.

My Lords, the second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago when the usury laws were in force. The Court of Equity went beyond the usury laws, and set its face against every transaction which tended to usury. It therefore declared void every stipulation by a mortgagee for a collateral advantage which made his total remuneration for the loan indirectly exceed the legal interest. I think it will be found that every case under this head of equity was decided either on this ground, or on the ground that the bargain was oppressive and unconscionable. The abolition of the usury laws has made an alteration in the view the Court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. On these grounds I think the case of *Biggs* v. *Hoddinott* (2) in the Court of Appeal was rightly decided.

The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: Once a mortgage always a mortgage and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it. I do not dissent from the opinion expressed by my noble and learned friend opposite (Lord Lindley), when Master of

(1) [1892] A. C. 1. (2) [1898] 2 Ch. 307.

H. L. (E.) 1901 NOAKES & Co., LIMITED v. RICE. Lord Davey.

the Rolls, in the case of *Santley* v. *Wilde*. (1) He says: "A clog or fetter is something which is inconsistent with the idea of security; a clog or fetter is in the nature of a repugnant condition." But I ask, "security" for what? I think it must be security for the principal, interest, and costs, and, I will add, for any advantages in the nature of increased interest or remuneration for the loan which the mortgagee has validly stipulated for during the continuance of the mortgage. There are two elements in the conception of a mortgage: first, security for the money advanced; and, secondly, remuneration for the use of the money. When the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. I confess I should have decided the case of *Santley* v. *Wilde* (1) differently from the way in which it was dealt with in the Court of Appeal. After the payment of principal and interest, and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan. In my opinion, every yearly or other recurring payment stipulated for by the mortgagee should be held to be in the nature of interest, and no more payable after the principal is paid off than interest would be. I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid, and I do not think he can stipulate for any other recurring payment such as a share of profits. Any stipulation to that effect would, in my opinion, be void as a clog or fetter on the equity of redemption.

By the Conveyancing Act a mortgagee may now be required

(1) [1899] 2 Ch. 474.

to transfer his mortgage on payment of what is due to him, and he must then transfer all his security, including every advantage which he derives from the mortgage transaction, and all his deeds and documents constituting his title as mortgagee. And on redemption he must do the like to the mortgagor, and any stipulation which varies the effect and incidents of redemption on payment off of what is due on the loan is a clog within the meaning of the rule.

Now, applying what I have said to the present case, the decision becomes easy. In the first place, I do not think that the respondent's covenant to deal exclusively with the brewers continued after the payment off of the loan and the redemption; and, secondly, if it did, it was an attempt to charge it on the property, and that constituted a clog or fetter which, according to well-established principles, was void.

My Lords, I only desire to add that, with my noble and learned friend by my side (Lord Macnaghten), I cannot assent altogether to the assumption made by Cozens-Hardy J. that the covenant constituted or might constitute a good charge upon the property by virtue of the operation of the doctrine in *Tulk* v. *Moxhay*. (1) I should hesitate some time before I assented to that proposition; but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.

My Lords, upon these grounds I agree with the motion proposed by my noble and learned friend.

LORD BRAMPTON. My Lords, I am so satisfied in my own mind with the judgment pronounced by Cozens-Hardy J. and by the Court of Appeal, and the judgment already proposed to this House by my noble and learned friends, that I think I should be wasting your Lordships' time if I were to add anything to them beyond expressing my concurrence.

LORD ROBERTSON. My Lords, I concur.

(1) (1848) 2 Ph. 774.

H. L. (E.) 1901 NOAKES & Co., LIMITED v. RICE.

LORD LINDLEY. My Lords, I agree in thinking that the covenant contained in this mortgage, and by which the mortgagees have attempted to convert the house mortgaged from a free public-house into a tied public-house even after redemption, is invalid. I see no answer to the objection taken to it that upon payment off of the mortgage money the mortgagor cannot get back what he mortgaged, namely, a free public-house. The attempt to strengthen the tie by stipulating for liquidated damages and charging them on the property certainly does not mend matters, but makes them worse.

The case before us is not like the case of a mortgage of wasting property, e.g., a lease which, owing to its nature, cannot be given back on redemption in the state in which it was mortgaged. Here the mortgage contains a covenant the object of which is to disentitle the mortgagor on redemption from having back the property unfettered by that covenant. This is inconsistent with the settled law of mortgage.

I regard the mortgage deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law or by the doctrine laid down by *Tulk* v. *Moxhay* (1), which has often lately been relied upon as going much further than it does.

The conclusion thus arrived at is not inconsistent with *Santley* v. *Wilde* (2), on which the appellants so strongly rely. Some of your Lordships think that case went too far. I do not think so myself; but I will not trouble your Lordships with its details, which were complicated. The principle on which the Court of Appeal decided the case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the Court of Appeal in *Biggs* v. *Hoddinott* (3) and *Santley* v. *Wilde*. (2) That principle is perfectly consistent with a real pledge and with the maxim "Once a mortgage always a mortgage"; but it will not render valid the covenant which your Lordships have to consider in the present case.

(1) 2 Ph. 774. (2) [1899] 2 Ch. 474.
(3) [1898] 2 Ch. 307.

I agree that this appeal ought to be dismissed with costs.

As regards the recent case of *Browne* v. *Ryan* (1) in Ireland, I am not satisfied that the Court of Appeal did not go too far in holding that the plaintiff's action for damages could not be sustained.

H. L. (E.) 1901 NOAKES & Co., LIMITED v. RICE.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 17, 1901.

Solicitors: *Fishers; Sandilands & Co.*

[HOUSE OF LORDS.]

BLAIR . . . . . APPELLANT;

AND

DUNCAN AND ANOTHER . . . . . RESPONDENTS.

H. L. (Sc.) 1901 *Dec.* 17.

Trust—Charity—Uncertainty—"Such Charitable or Public Purposes as my Trustee thinks proper"—Scottish Law.

A testatrix by codicil in her own handwriting directed her trustee that—in the events which happened—one-half of the residue of her estate should be applied for "such charitable or public purposes as my trustee thinks proper":—

Held, affirming the decision of the Second Division of the Court of Session, that the direction was void for uncertainty.

APPEAL from the Second Division of the Court of Session, Scotland. (2)

The appellant was the sole trustee of the late Miss A. W. Young, and this action was brought against him for an account by the late A. Young, whose interests in the appeal were represented by the respondents, James Barker Duncan and R. G. Scott. Miss A. W. Young left a will dated December 5, 1898, in which she bequeathed the residue of her estate, valued at 18,000*l.*, to her two brothers, A. Young and the Rev. J. G. Young, equally between them, and if either predeceased her,

(1) [1901] 2 I. R. 653. (2) (1900) 3 F. 274; 38 S. L. R. 209.

H. L. (Sc.) 1901 BLAIR v. DUNCAN.

then the whole to the survivor. Later on the same date the testatrix executed a codicil in her own handwriting by which, after referring to the will, she directed that in the event of either of her brothers predeceasing her the half residue, and in the event of both predeceasing her the whole residue, should be "applied for such charitable or public purposes as my trustee thinks proper."

The Rev. J. G. Young predeceased the testatrix. The appellant was prepared to carry into practical effect the direction contained in the codicil as regards half of the residue, amounting to 9000*l.*, when the present action was raised. The sole question was whether the direction contained in the codicil respecting one-half of the residue was void for vagueness and uncertainty.

On July 19, 1900, the Lord Ordinary (Lord Pearson) found that the legacy of half the residue for charitable or public purposes was not void. But the Second Division of the Court of Session, by order dated December 14, 1900 (1), recalled the Lord Ordinary's interlocutor, holding that the direction in the codicil was vague and uncertain, and therefore invalid.

1901. Nov. 25, 26. *A. Graham Murray, L.A., John Wilson, K.C.* (with them *R. Scott Brown* and *Allan J. Lawrie*), (all of the Scottish Bar except the last), for the appellant. The decision of the Second Division is erroneous. A bequest to a trustee for "public purposes" to be selected by him is a good bequest. In England, under the statute 43 Eliz. c. 4, the word "charitable" has a specific meaning much wider than its natural signification, and the statute may be referred to for a definition of what is "charitable"; but in Scotland there is no such statute, and it must not be assumed that the word "charitable" in both countries represents the same category of interests. The English rule that a bequest for distribution at the discretion of trustees for any other than "charitable purposes" is void has never been adopted by the law of Scotland. On the contrary, the law of Scotland holds such a bequest to be valid, whether for charitable purposes or not,

(1) 3 F. 274.

provided that a particular class of individuals or objects are named, and that power is given to a specified individual to select from among the class: *Miller* v. *Black's Trustees* (1); *Hill* v. *Burns* (2); *Crichton* v. *Grierson*. (3) The Scottish law follows the Roman law: Digest, bk. 30, tit. 1, s. 43. The ground of the English rule is explained in *Cobb* v. *Cobb's Trustees* (4) and *Brown's Trustees* v. *Young*. (5) In Scotland the expression "charitable" is just as vague as "public purposes." And inasmuch as the Courts in Scotland have held that a charitable bequest is good, and that not on the ground that it is charitable, but merely on the ground that apt language has been used, and that the person designated can carry it out, the same ratio applies to a bequest for "public purposes." The earlier Scottish decisions are *Wharrie* v. *Wharrie* (6); *Murray* v. *Fleeming* (7); *Trustees of John Brown* v. *His Relations* (8); *Snodgrass* v. *Buchanan* (9); *Horn's Will* (10), cited in *Hill* v. *Burns* (11); and cases after the decision of the House of Lords: *Dundas* v. *Dundas* (12); *Robbie's Judicial Factor* v. *Macrae* (13); *M'Gregor's Trustees* v. *Bosomworth* (14); and M'Laren on Wills, 3rd ed. vol. ii. par. 1691. The word "charitable" does not contain in itself such a meaning as to distinguish it from the word "public." These words are frequently used synonymously in common and legal language. *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (15) shews that the word "charitable" in ordinary language is almost undefinable. It is submitted that a bequest for public purposes denotes a class sufficiently definite to take according to the law of Scotland.

[They also commented on Ersk. Inst. 3, 9, 14; Tudor's Charities, 2; *Kelland* v. *Douglas* (16); *M'Lean* v. *Henderson's*

(1) (1837) 2 S. & M'L. 866, 891.
(2) (1826) 2 W. & S. 80.
(3) (1828) 3 W. & S. 329, 338, 339.
(4) (1894) 21 R. 638, 640.
(5) (1898) 6 S. L. Times, 32, 34.
(6) (1760) Mor. Dict. 6599.
(7) (1729) Mor. Dict. 4075.
(8) (1762) Mor. Dict. 2318.
(9) (1806) Mor. Dict. Ap. Ser. Heirs, 1.
(10) (1741) See H. L. printed App. Papers of *Hill* v. *Burns* in 1826.
(11) 2 W. & S. 80, 87.
(12) (1837) 15 S. 427.
(13) (1893) 20 R. 358.
(14) (1896) 33 S. L. R. 364–5.
(15) [1891] A. C. 531, 560.
(16) (1863) 2 M. 150, 160.

H. L. (Sc.) 1901 BLAIR v. DUNCAN.

Trustees (1); *Whicker* v. *Hume* (2); *Playfair's Trustees* v. *Playfair* (3); *In re Jarman's Estate.* (4)]

[THE EARL OF HALSBURY referred to *Williams* v. *Kershaw.* (5)]

Scott Dickson, S.G., and *Younger, K.C.* (with them *Duncan Millar*), (all of the Scottish Bar except the second), for respondents. In *Hill* v. *Burns* (6) this House examined all the cases except *Snodgrass* v. *Buchanan* (7), which does not diverge, and laid down a principle since followed by the Scottish Courts, that the gift in order to be good must be for a definite object. By the use of the disjunctive "or" coupling together the words "charitable" and "public" the testatrix shewed her intention not to limit the purposes of her bequest merely to charitable purposes, but gave her trustee a choice of two alternatives. Under such a direction the appellant might apply the whole half residue to purposes other than charitable. But a bequest for public purposes is void on the ground of vagueness; secondly, where a discretion is conferred on a trustee to apply a bequest either to charitable purposes or public purposes without any qualification except the discretion of the trustee, the whole bequest is void and inoperative, for it is well settled by the law of Scotland that a testator cannot confer on his trustee the power to select at his discretion the objects of the testator's bounty which the testator has not himself chosen in any way to specify. On the other hand, it is equally well established that a testator, if he does not choose to select the individual and specific objects of his bounty, may in certain cases fix a particular and well-defined class of individuals or objects of which his trustee may be empowered by him to choose the individuals: see *Crichton* v. *Grierson.* (8) The respondents found on *Miller* v. *Black's Trustees.* (9) Subject to the technical meaning of the word "charitable," there is very little difference between the laws of England and Scotland with respect to charities: *Magistrates of Dundee* v. *Morris* (10);

(1) (1880) 7 R. 601, 611.
(2) (1858) 7 H. L. C. 124.
(3) (1900) 2 F. 686.
(4) (1878) 8 Ch. D. 584.
(5) (1835) 5 Cl. & F. 111, n.
(6) 2 W. & S. 80, 87.
(7) Mor. Dict. Ap. Ser. Heirs, 1.
(8) 3 W. & S. 329.
(9) 2 S. & M'L. 866.
(10) (1858) 3 Macq. 134, 153.

Williamson v. *Gardiner*. (1) *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2) was a judgment on the signification of Scottish legislative language, and goes no further than that according to legislative language the word "charitable" has a wider meaning when used by the Legislature dealing with England and Scotland. And although the head-note to *Pemsel's Case* (2) states that *Baird's Trustees* v. *Lord Advocate* (3) was overruled, yet that case still stands as an exposition of Scottish law apart from the taxing statute. The judgments in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2) were considered in *In re Macduff*. (4) In *Hunter* v. *Attorney-General* (5) the purchase of an advowson was held to be a charitable trust, but failed because the bequest did not say what was to be done with the advowson when purchased. The word "charitable" is much narrower and more definite than the word "public": *In re Nottage*. (6) A gift to encourage the sport of yacht racing was held not to be a charitable bequest, but it might have been described as a public bequest. Again, the words "public purposes" are too vague to bring the gift within the word "charitable," and there is no authority to shew such a gift would even in England be valid; on the contrary, the English decisions are against it: *Dolan* v. *Macdermot* (7); and *Mitford* v. *Reynolds* (8), explained in *Nightingale* v. *Goulburn*. (9) You may have a trust void in Scotland for uncertainty as in England; and in this case, if the gift be not for charitable purposes but for public purposes, as the alternative shews, the gift is too vague and uncertain to be given effect to.

A. Graham Murray, L.A., in reply.

The House took time for consideration.

Dec. 17. EARL OF HALSBURY L.C. My Lords, in this case I do not propose to repeat what I said at some length in

(1) (1865) 4 M. 66.
(2) [1891] A. C. 531.
(3) (1888) 15 R. 682.
(4) [1896] 2 Ch. 451.
(5) [1899] A. C. 309.
(6) [1895] 2 Ch. 649.
(7) (1867–8) 5 Eq. 60; L. R. 3 Ch. 676.
(8) (1841) 1 Ph. 185.
(9) (1847) 5 Hare, 484.

H. L. (Sc.) 1901 BLAIR v. DUNCAN. Earl of Halsbury L.C.

Commissioners for Special Purposes of Income Tax v. *Pemsel* (1), nor do I think it is necessary to appeal to the decision in that case for the purpose of the decision of this. I will only say that in my view the decision of that case is an authoritative determination, and, in speaking of a Taxing Act which applies to both countries, the decision of that case must of course be supreme. But, speaking of a Scottish instrument and the interpretation to be given to the word "charitable" in Scotland, I should regard the decision of *Baird's Trustees* v. *Lord Advocate* (2) as still an authoritative exposition of the law of Scotland. I am not quite certain that it is important to consider that question at any length here, because, in the view that I take of this particular testamentary disposition, it appears to me that it is impossible to deny that the words on which the main question turns, namely, "charitable or public," are used disjunctively. Under those circumstances, it appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A. B., to determine what particular public purposes should be the objects of the trust, is too vague and uncertain for any Court either in England or Scotland to administer. The result of that is, as it appears to me, that the decision of the Court below was perfectly right; and I move your Lordships, therefore, that this appeal be dismissed with costs.

LORD SHAND. My Lords, I am of the same opinion. The whole argument of the appellant was founded on the alleged analogy between a bequest for public purposes and a bequest for charitable and benevolent purposes, which are objects of peculiar favour in the law both of Scotland and of England. In my opinion the analogy clearly fails, and I concur in thinking that a bequest for public purposes to be taken by a person or persons named by the testator, unlike a bequest expressly limited to a charitable purpose, is not sufficiently definite, but is too vague and wide to form the subject of a valid bequest.

(1) [1891] A. C. 531, 539. (2) 15 R. 682.

I will only add that I concur in the judgment of my noble and learned friend Lord Robertson, which his Lordship has given me the opportunity of reading and considering.

LORD DAVEY. My Lords, the short question on this appeal is whether a trust for such "charitable or public purposes" as the executor may select is a valid disposition of the testator's property according to the law of Scotland, or is void for uncertainty.

Your Lordships were exhorted by the Lord Advocate to dismiss from your minds all preconceived notions derived from the English law of charities, and I have done my best to humbly obey that exhortation. There is no doubt that the English law has attached a wide and somewhat artificial meaning to the words "charity" and "charitable," derived, it is said, from the enumeration of objects in the well-known Act of Elizabeth, but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words. In the course of the argument there was some discussion as to the meaning attached by Scottish judges to the words "charitable purposes." I think that those words include a wider range of objects than such as are of a merely eleemosynary character, and I find authority for saying so in the opinion of Lord Watson in the *Pemsel Case*. (1)

But, my Lords, I do not find it necessary to pursue or elaborate the discussion of this topic in the present case, because it is, in my opinion, clearly established that, whatever may be the legal definition of the expression, the Courts of Scotland will give effect to a disposition in favour of charitable purposes to be selected by a named individual. In other words, such a trust is treated as being sufficiently definite to be the subject of a valid disposition.

There are three cases in this House to which your Lordships' attention was called. In *Hill* v. *Burns* (2) a bequest to trustees was held valid, whereby a testatrix appointed the

(1) [1891] A. C. 531, 560, 561. (2) 2 W. & S. 80.

H. L. (Sc.) 1901 BLAIR v. DUNCAN. Lord Davey.

residue of her estate to be applied by her trustees in aid of "the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow, or neighbourhood thereof," to be appropriated in such manner as to the trustees might seem proper. In *Crichton* v. *Grierson* (1) a gift to trustees of a residue to be applied in such charitable purposes and bequests to such of the testator's friends and relations as might be pointed out by his wife, with the approbation of the majority of the trustees, was also held valid. Lastly, in *Miller* v. *Black's Trustees* (2) a bequest for such charitable and benevolent purposes as the trustees might think proper was held valid.

If, therefore, the words in the present case were merely "charitable purposes," or were "charitable and public purposes," I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character.

But, my Lords, the words we have here are "charitable or public purposes," and I think these words must be read disjunctively. It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable though they might be of a public character. Now, my Lords, I am not aware of any case in which effect has been given in the Scottish Courts to a trust for "public purposes," and I find in the cases which have been referred to indications that such a trust would not be considered valid. In *Crichton* v. *Grierson* (3) Lord Lyndhurst L.C. states the question thus: whether effect may be given to a power of selection amongst the individuals comprised in "particular classes of individuals and objects"; and he answers the question by saying that, according to the authorities in the law of Scotland, a person may make such a disposition. Can it be said that "public purposes" is within the description of a particular class of individuals or objects? I think not. Illustrations were given at the bar, and might be multiplied to

(1) 3 W. & S. 329. (2) 2 S. & M'L. 866.
(3) 3 W. & S. 329, 338, 339.

any extent, of purposes which would come within the description of "public," and the statement of which would reduce the gift almost ad absurdum. The Lord Advocate argued that the expression "public" was no more vague than "charitable." I do not agree, although an exhaustive definition of "charitable" might be difficult, and to attempt it would be unwise. At any rate, it is positivi juris that the Courts will give effect to a gift for charitable purposes to be selected by an individual. It may be that the law of Scotland is more liberal in the interpretation of bequests for charitable purposes than other bequests, as was said by Lord Gifford in advising this House in *Hill* v. *Burns*. (1) In *M'Lean* v. *Henderson's Trustees* (2) Lord Moncreiff expressed himself in words which shew that in his opinion a bequest might be void for uncertainty if not within the category of charitable bequests.

My Lords, it appears to me that the point to which I have directed my observations is put clearly and concisely by Lord Young, when he says that he could not on authority or principle sustain public purposes as a valid direction to a testamentary trustee.

For these reasons I am of opinion that the appeal should be dismissed with costs.

LORD BRAMPTON. My Lords, in an event, which has happened, the testatrix by a codicil to her will directed that one-half of the residue of her estate shall be applied for such "charitable or public purposes" as the testamentary trustee nominated in her will should think proper. It is not disputed that if the word "charitable" had stood alone the devise would have been sufficiently definite and valid; but it is urged by the respondents that the addition of the words "or public purposes" renders the devise indefinite and void because of its vagueness. It seems to me that the addition of those words would confer upon the trustee the power at his option to set aside charitable purposes altogether, and apply the

(1) 2 W. & S. 80, 86. (2) 7 R. 601, 611.

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whole of the bequest solely to any one or more of innumerable public purposes comprised within an unlimited area. In short, the intentions of the testatrix are on the face of the will and codicil left, so far as relates to the "public purposes" to be benefited, in absolute uncertainty.

I think, therefore, that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, the argument at your Lordships' bar, able and ingenious as it was, makes it necessary to remember that the question now before the House is whether a bequest of money for such public purposes as the trustee under the will thinks proper is or is not valid (for I am clearly of opinion with your Lordships that the gift to public purposes is disjoined from that to charitable purposes).

Now, it is a significant fact that this question, on its merits, has been little if at all discussed by the learned counsel for the appellant. If a bequest by A. to any public purpose to be selected by B. is defensible on its merits, it must be on one of two grounds: either that by law A. may validly leave money to be given to any purpose whatever named by B., or that the purposes named, namely, "public" purposes, are not vague and uncertain.

The former of these propositions was asserted by the appellant, but no more than asserted, on the authority of the opinions delivered in the Court of Session in *Hill* v. *Burns*. (1) When those opinions and the authorities cited in them are examined, it will be found that they give no support to the proposition that a bequest is valid which consists merely of a direction that a certain sum of money shall go to any purpose that a nominated trustee may think proper. The case then before the learned judges was not such an unlimited power at all, but a direction to trustees to select as the object of the legacy such of the benevolent and charitable institutions in Glasgow as they thought fit. And in speaking of alienum arbitrium they were defending the bequest against the objection

(1) 2 W. & S. 80, 82.

that the intervention of alienum arbitrium to any extent made the legacy void. This is made perfectly plain by the reference by the Lord President to the cases of *Brown* (1) and of *Buchanan* (2), in both of which the alienum arbitrium was invoked merely to select from among the testator's own relations. There is, so far as I know, no authority for the broader proposition that according to Scottish law a good bequest is made by A. when he directs B. to make a will for him as regards either the whole or a part of his estate, and it is contrary to the fundamental idea of testamentary disposition.

What has been established as regards the intervention of a trustee is thus stated by Lyndhurst L.C. in *Crichton* v. *Grierson* (3), and the passage touches the very core of the present case: he says that "according to the authorities in the law of Scotland it is quite clear that a man may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power after his death of appropriating the property or applying any part of his property to any particular individuals among that class whom that person may select." This is the rule which has got to be applied in the present case, and the question is, Has this testatrix done what Lord Lyndhurst describes—has she selected a particular class or particular classes of objects among which her trustee is to select?

Now, as I have already remarked, we have not had much argument from the appellant on this question by itself and apart from the medium of the decision about charities. I cannot say that I am surprised, for it seems to me that this testatrix has done nothing like selecting a particular class or particular classes of objects. She excludes individuals, and then leaves the trustee at large, with the whole world to choose from. There is nothing affecting any community on the globe which is outside the ambit of his choice.

Now, I have not heard any one say that this bequest is not

(1) *Trustees of Brown* v. *His Relations*, Mor. Dict. 2318.

(2) *Snodgrass* v. *Buchanan*, Mor. Dict. Ap. Ser. Heirs, 1.

(3) 3 W. & S. 329, 338, 339.

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vague and uncertain; what is said is merely that a gift to any charitable purpose, to be selected by a trustee, is equally vague, and that the law allows the validity of a gift to any charitable purpose to be selected by a trustee. The soundness of this argument must therefore be considered.

First of all, I do not agree that "charitable purposes" is as wide or nearly as wide as "public purposes." Even giving to the word "charitable" the widest extension ever allowed to it, there are, as I should believe, many public purposes completely outside it. Giving to the word "charitable" its proper meaning as it occurs in a Scottish testament, its comprehensiveness still further falls short of the word "public." As was suggested at the bar, the trustee would be within his powers if he gave this 9000*l.* to the election fund of any of the political parties that he pleased. It would be equally within his powers to subscribe the money towards raising a Yeomanry regiment. Each of these purposes is "public," neither is "charitable." Innumerable other illustrations might be given.

A great deal of the appellant's argument was directed to enforcing the relevancy of the decisions about the word "charitable" by shewing that they could not be distinguished from the present case. With this view your Lordships had presented to you an elaborate and interesting discussion of the difference between the law of charities in England and the law of charities in Scotland.

Much that was advanced is unquestionably sound (although I consider it inconclusive of the present question). "Ever since its institution," said Lord Watson in *Pemsel's Case* (1), "the Court of Session has exercised plenary jurisdiction over the administration of all trusts, whether public or private, irrespective of the particular purpose to which the estate or income of the trust may be appropriated; and there has consequently been no room for those numerous questions as to a trust being charitable or not, which have arisen in England under the Statute of Elizabeth." The

(1) [1891] A. C. 531, 560.

relations of the Court of Session to charities had been based on the same general ground by Lord Cuninghame and Lord Cockburn in *Ross* v. *Heriot's Hospital* (1), and it cannot be doubted that this is an accurate statement of the law. Nor do I think that exception can be taken to the interesting comparison of the laws of the two countries given by Lord Stormonth Darling in *Cobb* v. *Cobb's Trustees* (2) (although I do not concur in the deductions drawn by that learned judge, so far as bearing on purposes other than charitable).

But while charitable trusts are, as matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the Courts in Scotland exactly as other trusts would be treated. The Courts have, I think, as matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes every one favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordships' House in the *Morgan Case*. (3) To this favour for charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships, I am unable to hold that the designation of public purposes is a compliance with the rule.

Younger, K.C. It was arranged between the parties that

(1) (1843) 5 D. 589, 608, 625. (2) 21 R. 638.
(3) *Magistrates of Dundee* v. *Morris*, 3 Macq. 134.

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the costs (subject to your Lordships' approval) should come out of the fund in dispute.

EARL OF HALSBURY L.C. We make no order as to costs.

Interlocutor appealed from affirmed; no order as to costs.

Lords' Journals, December 17, 1901.

Agents for appellant: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Duncan & Black, W.S., Edinburgh.*

[PRIVY COUNCIL.]

In re THE QUEEN *v.* MARAIS.
Ex parte MARAIS.

J. C.*
1901
July 24.

IN APPEAL FROM A SPECIAL COURT OF THE COLONY OF NATAL.

Practice—Special Leave—Conviction by Special Court—Acting Judge—Colonial Laws Validity Act—Construction.

The obvious meaning of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) is to preserve to the Imperial Parliament a right to legislate for a Colony to which a local legislature has been assigned, and to forbid the local legislature to enact anything repugnant to Imperial legislation so effected, but not otherwise to derogate from the general powers of Colonial legislatures.

An acting judge of the Supreme Court is a judge thereof within the meaning of Natal Special Court Act, No. 14 of 1900.

Special leave to appeal from a conviction by a Special Court of Natal (constituted under the said Act) refused.

THIS was a petition by Jan Lodewyk Marais, a prisoner in the Etchowe gaol, Zululand, for special leave to appeal from a judgment dated December 18, 1900, of the Special Court of Natal, constituted under Natal Act 14 of 1900, and composed of Commissioners.

The petitioner and Adrian Izak Marais were indicted in that, on specified occasions from November, 1899, to March, 1900, they had harboured the enemy, supplied him with food, house, shelter, and other aid, assisted in operations of war, performed the duties of military policemen, and assisted in the attack on Ladysmith.

Sect. 2 of No. 14 of 1900 provides that "one at least of such Commissioners shall be a judge of the Supreme Court." Before plea the petitioner, through his counsel, lodged, amongst others, the following exceptions: (1.) that the Court as constituted did not comply with the Act, for that none of the Commissioners was a judge of the Supreme Court; (2.) that the petitioner was not liable to be tried under Roman-Dutch

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

J. C. 1901 REG. v. MARAIS, *In re.* MARAIS, *Ex parte.*

law; (3.) that the English law applied, and that its procedure cannot be varied; (4.) that s. 4 of Natal Act No. 3 of 1868 is repugnant to the laws of England, and therefore contrary to the spirit and intention of s. 6 of the Charter of Natal of July 15, 1856; (5.) that the petitioner was entitled to all the privileges of English law, especially those secured by 11 Hen. 7, c. 1, of 1495. He also contended that, the then conquering States having secured absolute possession of that part of the Colony where he resided, and having ordered and commandeered him, he was not, in the circumstances of compulsion by superior force, liable to the indictment. He was found guilty under counts 2 and 3, which did not relate to the actual attack on Ladysmith, and sentenced to imprisonment and fine.

The petition prayed for special leave to appeal on the same grounds as were contained in the exceptions, and in particular that the Court was wrongly constituted, that he was wrongly tried under Roman-Dutch law, that he was entitled to be tried by English law except so far as it had been varied by such local legislation as was in compliance with the Colonial Laws Act, 1865.

Lord Coleridge, K.C., *Stocken*, and *Renaud*, for the petitioner, contended (1.) that the Court was wrongly constituted. Act 14 of 1900 provided that the Court should be composed of three Commissioners, whom the Governor was empowered by s. 2 to appoint. Each Commissioner was to be a person qualified to be appointed a judge of the Supreme Court or of one of the Superior Courts of any of His Majesty's Colonies. One at least should be actually a judge of the Supreme Court—that is (see interpretation clause), of the Natal Supreme Court. The Governor was also empowered, at the request of the Chief Justice, to appoint as an acting judge of the Supreme Court any person qualified to be a judge thereof under the Supreme Court Act, 1896 (No. 39). The acting judge was to have the same jurisdiction as a judge appointed under s. 32 of the Supreme Court Act. There was a marked distinction between the two. The acting judge was appointed for a limited time and was easily removable; the permanent judge could only be removed on an

address from the legislature. On this Commission one acting judge sat, but no permanent judge. They contended (2.) that the petitioner was entitled to be tried by a jury. The original settlers in Natal carried with them the law of England, which included the right to a trial by jury in cases of this kind. Later on Roman-Dutch law was made applicable by a Colonial statute (No. 12 of 1845). That Colonial Act was, in respect of the matter now in question, ultra vires the local legislature. So also was Act 14 of 1900. It was repugnant to the law of England, within the meaning of the Colonial Laws Validity Act, 1865, to deprive a person accused of high treason of a trial by jury.

Leonard, K.C., and *Colefax*, for the Natal Government, were only heard on the first point. Necessity led to the creation of a special tribunal, as it was impracticable to get an impartial jury. There was nothing to justify a distinction between a permanent and an acting judge. A temporary exigency rendered necessary a temporary increase to the number of judges, and the temporary judges were vested with all the powers of the permanent judges.

Lord Coleridge, K.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that no leave should be given to appeal in this case.

With reference to the second point, on which their Lordships did not ask counsel for an answer to Lord Coleridge's argument, there is no doubt that up to the time of the passing of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) a great many of the considerations which he has urged had given rise to difficulties, and it was for the express purpose of getting rid of the difficulties that had been raised on that subject, and particularly in reference to the words "repugnancy to the laws of England," that that Act was passed, because one of the common and familiar forms whereby the Colonial legislatures were constituted and constitutions given provided that nothing should be enacted repugnant to the laws of England; and there is no doubt that that had given rise to some doubts and difficulties which this Act was intended to cure.

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With respect to that matter we have now this statute of 1865 to construe; and, in respect to that statute, what has been pointed out is that the words "repugnant to the laws of England" are not now to be, in their bald sense, construed with reference to such a question as this, but you must take the interpretation clause, which now qualifies those words, into the consideration of what has been enacted here: that what was to be repugnant to the laws of England within the meaning of those words was to be a repugnancy such as is repugnant to the provisions of some such Act of Parliament or regulation "as aforesaid"; and that is again qualified in this way: "In construing this Act, an Act of Parliament or any provision thereof shall be said to extend to any Colony when it is made applicable to such Colony by the express words or necessary intendment of any Act of Parliament." The obvious purpose and meaning of that statute was to preserve the right of the Imperial Legislature to legislate even for the Colony, although a local legislature had been given, and to make it impossible, when an Imperial statute had been passed expressly for the purpose of governing that Colony, for the Colonial legislature in that sense to enact anything repugnant to an express law applied to that Colony by the Imperial Legislature itself. That is the meaning of those words.

As to the other argument with reference to legislation by a Colony which in some respects shall run counter to, or be repugnant to, some law of the United Kingdom, that, if it were construed in the wide sense Lord Coleridge suggested, would render any Colonial legislation illusory altogether, because it is hardly possible to deal with the rights of any British subject by the local legislature which shall not in some way or another run counter to some provision in this country which is enacted for a different purpose, having no special reference to the circumstances of the particular Colony. This statute reconciles the two principles of giving local legislation, but, nevertheless, leaving still open to the Imperial Legislature by express legislative provision the power to do something in the Colony. So much for the second point urged by Lord Coleridge.

With reference to the first point, namely, the constitution of the Court, it lies in a very narrow compass indeed. It comes very much to the question of whether an acting judge is a judge of the Supreme Court.

Their Lordships entertain some difficulty in saying how to construe those words that he is to *be* an acting judge of the Supreme Court, without importing at the same time that when appointed he *is* a judge of the Supreme Court. By the power of appointment he is made an acting judge of the Supreme Court; and it was the object of the statute, apparently, that he should be made a judge of the Supreme Court with reference to the exigencies of the performance of the duties of a judge, and the demand upon the judges of the Supreme Court, to get rid of the difficulty which would arise by the occupation of the Supreme Court in other duties than those which they were habitually performing. There is undoubtedly a curious correspondence between the number of Commissions that may exist at the same time, by the 32nd section (Natal Special Court Act, No. 14 of 1900), and the number of acting judges who may be appointed. The Governor may appoint two special Commissions, and two acting judges may be appointed. It does seem to suggest that those provisions are intended to correspond with each other. There is a provision which certainly does give some protection to the public with reference to the persons appointed. The Governor cannot on his own mere notion appoint a person as an acting judge for the purposes of this Act of Parliament. By the 28th section it must be at the request of the Chief Justice. So that, in order to preside or to be one of the Commissioners, you must have a person qualified to be a judge, and an acting judge must be appointed at the request of the Chief Justice.

It does not appear to be denied—in fact, it was admitted—that this particular man was tried by a person who was an acting judge; and their Lordships are called upon to say that the Court was not properly constituted because one of them was a person who was not permanently a Supreme Court judge, but was a person who was only an acting judge within

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the meaning of this Act of Parliament. Their Lordships are not able to say that that prevents his being a judge of the Supreme Court; and if he was a judge of the Supreme Court the provision of the statute is satisfied, and the Commission was properly constituted.

For these reasons their Lordships will humbly advise His Majesty that no leave to appeal should be given.

Solicitor for petitioner: *Walter A. Stocken.*
Solicitors for the Government of Natal: *Kimbers & Boatman.*

[PRIVY COUNCIL.]

J. C.* 1901 *July* 26; *Nov.* 9.

TE TEIRA TE PAEA AND OTHERS . . PLAINTIFFS;

AND

TE ROERA TAREHA AND ANOTHER . . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Confiscation—Regrant of Native Lands—Trust—Construction of Regrant.

The expression "to be held in trust" for a definite class of persons is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings.

Kinloch v. *Secretary of State for India in Council*, (1882) 7 App. Cas. 625, referred to.

By an agreement in 1870 between the Government of New Zealand and certain natives whose names were scheduled thereto (which agreement was afterwards incorporated in the Mohaka and Waikare District Act, 1870), it was provided that the block of lands in suit, over which the Government had by force of a proclamation in 1867 issued under the New Zealand Settlement Act, 1863, an absolute power of disposition, native titles having been thereby extinguished, should be allotted to T., a Maori chief, and held in trust by him "in the manner provided or hereinafter to be provided by the General Assembly for native lands held under trust." In a suit by the appellants against T.'s devisees thereof to declare that the said block was held by T. as a trustee for the loyal owners thereof

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* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

according to native custom and usage the natives beneficially entitled thereto:—

Held, that, under all the circumstances and notwithstanding the words of trust in the agreement, T. took absolutely and beneficially; and that the respondents were not affected by any trusts in favour of the appellants. The allottees of each block comprised in the agreement or their successors were the only persons beneficially entitled thereto.

Those circumstances were—that the Act contained no reference to any native custom or trust, but treated the scheduled persons as entitled to grants in fee simple (an expression inapplicable to lands held by native custom); that there was no evidence as to who were regarded in 1867 as loyal inhabitants or entitled to the benefits of the proclamation; that by the Native Lands Acts Amendment Act, 1881, certificates were to be given and grants made to the persons named in the schedule to the agreement of 1870 or their successors as tenants in common and not as joint tenants; that in 1882 certificates were ordered to be issued accordingly, and that T. received a certificate and a grant to hold to him, his heirs and assigns, for ever as from September 12, 1870, subject to certain restrictions specified in s. 8 of the Act of 1881, but without reference to any trust or native custom; and that the General Assembly were not shewn to have declared any trusts in favour of the appellants.

APPEAL from a judgment of the Court of Appeal (Oct. 20, 1896) upon certain questions of law arising in the course of the action which were stated for argument before trial, and were by consent removed into the Court of Appeal.

By the judgment appealed from it was decided that the agreement of June 13, 1870, set out in their Lordships' judgment, did not create Tareha a trustee of Kaiwaka block: that is a specific block of land situate in the district next mentioned and comprised in the agreement.

In consequence of the rebellion of certain native tribes, the Governor in Council, by proclamation dated January 12, 1867, declared that the Mohaka and Waikare district should be a district under the New Zealand Settlements Act, 1863, and purported to reserve and take the lands within the said district, and further declared that "no land of any loyal inhabitant within the said district will be retained by the Government."

The boundaries between the confiscated land and the lands of the loyal inhabitants within the said district were subsequently defined by an agreement dated June 13, 1870, entered into on behalf of the loyal claimants for the said land and the

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Government, whereby it was stipulated that the Government should grant certificates of title to the loyal claimants in respect thereof.

The question in the appeal was: Whether all the loyal inhabitants who, at the date of the said proclamation, owned, according to the ancient custom and usage of the Maori people, the said lands, are still beneficially entitled thereto according to the true construction of

(1.) The proclamation of January 12, 1867.

(2.) The agreement of June 13, 1870.

(3.) The Native Land Laws Amendment Act, 1881 (No. 18), ss. 7 and 8, which gave effect to the said agreement and provided for the issue of titles in respect of the said lands;

or, whether the persons named in the schedule to the said agreement as the persons whose names were to be inserted in the certificates of title for the said lands are the sole beneficial owners thereof to the exclusion of the other loyal inhabitants who, at the time of the proclamation, had the same tribal rights to the said lands as the persons named in the said schedule.

The circumstances surrounding the proclamation, the agreement, and the Act are detailed in the judgment of their Lordships.

Haldane, K.C., and *Morison*, for the appellants, contended that, by the true construction of the concluding paragraphs of the agreement of June 13, 1870, certificates of title were to be issued having essentially the same effect as certificates of title issued in accordance with s. 17 of the Native Lands Act, 1867 (No. 43). The effect of it was that certificates should be issued to a limited number only of the loyal owners, who would hold the land allotted to them, not absolutely and beneficially in their own interests, but in trust for themselves and the other unnamed owners according to native custom, subject to restrictions on the alienability of the said lands. Tareha, no doubt, is named in the schedule as an allottee of Kaiwaka, and entitled to a certificate in respect thereof. Allottees of other blocks are also named in the schedule. But the natives named in the

schedule do not comprise all the loyal natives who are entitled according to custom and usage to the lands included therein. The Acts of the General Assembly in force at the date of the agreement empowered the Native Land Court to issue certificates of title to the persons ascertained to be owners of native lands. But they were to be issued to a limited number only of the owners—not more than ten. In order to protect the interests of the owners not named in the certificates, restrictions were imposed on the power of their holders to alienate: see Native Lands Act, 1865 (No. 71), ss. 23, 28, and 46, and the schedule thereto, and the Native Land Act, 1867, s. 17. The position of the persons named in a certificate of title under this s. 17 was that they held the land comprised therein in trust for and for the benefit of all the owners thereof: see *Te Raihi* v. *Grice*. (1) The Act of 1870 (No. 60), validating and incorporating the said agreement, authorized the Governor to issue Crown grants in fee simple in favour of the persons who were entitled under the agreement to the lands; but no provision was made by the Act for ascertaining who were the persons so entitled. No certificates were issued under the Act, which was repealed in 1878. The amendment Act in 1881 enacted that the Native Land Court should inquire and determine who were the persons entitled, the Governor being empowered to issue Crown grants in accordance with the certificates of title directed by the Court. These certificates were, under the Native Land Court Act, 1880, to comprise the names of all persons entitled. It was contended that the sole beneficial ownership of the lands comprised in any certificate did not, having regard to the terms of the agreement of 1870, vest in the persons named to the exclusion of the loyal inhabitants not named in the said schedule, being natives who, with the persons named in the schedule, were the owners according to Maori custom and usage of the said lands at the time of the proclamation. It did not appear, either in the Act of 1870 or in that of 1881, that the Legislature intended to confiscate the rights of any loyal inhabitants. On the contrary, those rights ought to be ascertained under the Acts of 1880 and 1881. The proclamation was intended to save

(1) (1886) 4 N. Z. L. R. Court of Appeal Rep. 219, 243.

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those rights in all cases. If the trust under the agreement of 1870 is not declared and enforced, the intention of the proclamation will be defeated; and the property of many of the loyal inhabitants will be confiscated.

Blake, K.C., *Northcote*, and *Lewis*, for the respondents, were not heard.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The question to be determined on this appeal is whether a Maori chief named Tareha, to whom certain lands known as the Kai Waka (or Kaiwaka) block were allotted by the New Zealand Government in June, 1870, was entitled to those lands beneficially, or whether he was a trustee of them for other natives.

Before stating the facts which have to be considered in this case, it will be convenient to make a few remarks on the land laws of the Colony in force in January, 1867, and on the Settlement Act of 1863 and 1865. The Native Land Act of 1865 was in force in 1867. In the Land Acts of the Colony native lands mean lands owned by natives under their customs or usages (Act of 1865, s. 2); hereditaments mean land subject to tenure under title derived from the Crown. A Land Court was constituted with power to investigate claims to native lands and to grant certificates of title (ss. 5 and 21–29, and schedule, and 40–44). But no certificate was to be granted to more than ten persons. The Court was empowered to restrict alienation by the certificated owners. But natives might hold "hereditaments" as distinguished from native lands, and it was an object to assimilate the law relating to hereditaments as nearly as possible to English law. Grants of lands were made by the Crown, and power was given to restrict alienation; but unless alienation was prohibited, a grantee of an hereditament could dispose of it. In case of the death of a grantee of an hereditament without having made a valid disposition, the Court was empowered to ascertain (Act of 1865, s. 30) "who according to law, as nearly as it can be reconciled with native custom, ought in the judgment of the Court to succeed to the hereditaments"; and the Court was empowered to make

orders having the effect of a valid will vesting the hereditaments of the deceased in such persons.

The New Zealand Settlement Act, 1863 (amended in 1865) referred to the serious rebellion of the natives in the Northern Island, and empowered the Governor in Council (Act of 1863, s. 2) to declare any district in which lands of rebellious natives or tribes were situate to be a "district" within the provisions of the Act, and to take out of such district lands for settlement and colonization (s. 3), and these lands were to be Crown lands (s. 4). Loyal natives having any interest in the lands thus taken were to be compensated (ss. 5, 7). By the Act of 1863 this compensation was to be made in money (ss. 13–15); but by the amending Act of 1865 (ss. 9 and 15) land might be granted by way of compensation, and trusts might be declared either of the money or of the land given in compensation.

Under the provisions of these two last-mentioned Acts, the Governor in Council issued a proclamation dated January 12, 1867, declaring certain lands specified in the schedule to be a "district" within the meaning of the New Zealand Settlements Act, 1863. By the same proclamation it was also declared that the lands within the said district, not being the property of or held under grant from the Crown, were reserved and taken for the purposes of settlements, and that such lands were required for the purposes of the said Act, and were subject to the provisions thereof as from the date of that order. It was also declared as follows: "that no land of any loyal inhabitant within the said district will be retained by the Government, and further, that all rebel inhabitants of the said district who come in within a reasonable time and make submission to the Queen will receive a sufficient quantity of land within the district for their maintenance."

The meaning and effect of this proclamation seems plain. None of the lands in the district continued to be native lands within the meaning of the Native Land Acts. All native titles by native custom were extinguished. But the Government was willing to grant out lands in the district to loyal natives and to others who should come in and submit within the time mentioned in the proclamation. Their title, however, to the

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lands granted to them would depend entirely on the terms of their grants.

The district formed under this proclamation was called the Mohaka and Waikare district or block. (1) It included the Kai Waka block, which is in question in this appeal. This block contained 31,200 acres or thereabouts.

Apart from the agreement of June 13, 1870, which will be referred to presently, there is no evidence before their Lordships to shew who were regarded in 1867 as loyal inhabitants, nor what rebel inhabitants came in and made their submission so as to entitle themselves to the benefits of the proclamation.

What was done under the proclamation before 1869 does not appear; but, on November 18, 1869, the following letter of instructions was sent by Sir Donald McLean, on behalf of the Government, to Mr. Locke, the resident magistrate for that part of the Colony:—

"Auckland,
"November 18, 1869.

"Sir,—I have the honour to request that you will carry out the settlement of the Waikare-Mohaka block.

"The Government do not expect or, indeed, desire to reap any pecuniary or other advantage from the confiscation of this block, or to incur any loss in connection therewith, but it is most desirable that all questions connected with it should be finally adjusted and disposed of. You will, therefore, endeavour to effect as equitable a settlement with the natives as possible, taking care that large reserves are made for their own use.

"The Chief Tareha, who is becoming dispossessed of most of his landed property, should have reserves secured upon him within that block.

"I need not supply you with more detailed instructions, as you are already acquainted with the history of this block, and I feel satisfied that you are fully competent to deal with it in such a just and equitable manner as will meet the requirements of the case.

"You will, of course, in this as in all other cases, confer with

(1) It is called block in the letter of November 18, 1869, set out below.

his Honour Mr. Ormond, who represents the general Government at Hawkes Bay, and act in accordance with his views in carrying out of these instructions.

"I have, &c.,

"Donald McLean.

"S. Locke, Esq.,
"R. M. Napier, Hawkes Bay."

The Waikare-Mohaka block here referred to is evidently the whole district of that name mentioned in the proclamation of January 12, 1867.

In accordance with these instructions a meeting of natives was held, and a formal agreement was come to with them on June 13, 1870. This agreement commences by reciting the proclamation of January, 1867; it then describes the lands forming the Mohaka and Waikare district, and proceeds as follows:—

"At a meeting of the loyal claimants of the said district and the Government agent for the East Coast, D. McLean, Esq., an agreement was entered into in which it was arranged that certain portions of the above-mentioned block should be retained by the above-mentioned loyal claimants, and other portions should be retained by the Government. And whereas a final settlement of the question has now been made in accordance with letter of instructions from the Honourable the Defence Minister, dated November 18, 1869.

"It is now agreed between the Government and the loyal claimants that the Government shall retain all the blocks and pieces of land hereinafter described and shewn in the plan attached hereto."

Here follow descriptions of blocks retained by Government with reservation of timber for road, &c., purposes.

"With the above exceptions, the whole block described in the proclamation before cited shall be conveyed to the loyal claimants under the following conditions:—

"The whole block shall be subdivided into several portions as shewn by the tracing annexed.

"The Government shall grant certificates of title for the several portions to the natives mentioned in the following schedule.

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"That the whole of the land shall be made inalienable both as to sale and mortgage, and held in trust in the manner provided or hereinafter to be provided by the General Assembly for native lands held under trust.

"[Signed

[Here follows thirty-two native names.]

"Schedule

"Of blocks to be retained by natives in Waikare Mohaka block, with names of persons whose names are to be inserted in Crown certificates."

The expression "held in trust," &c., has given rise to much controversy, and this appeal will be found ultimately to turn on its real meaning.

The schedule containing the names of the blocks, and of the persons to whom certificates were to be given, is very important. These details do not appear in the record, but their Lordships have been furnished with a full copy of the agreement and schedule. Thirteen blocks are named, Kai Waka being one of them. The names to be inserted in the Crown certificates in respect of each block are given under the name of the block. The total number of persons so named greatly exceeds thirty-two; from which it is plain that provision was made for many more persons than the thirty-two natives who signed the agreement. No block except Kai Waka has only one name under it. That block has only the name of Tareha. His name also appears, but with others, under the names of seven other blocks. No tribe is referred to as entitled to any block or land. One block has as many as forty names under it; another has thirty-nine; another thirty-eight; another thirty-five; none except Kai Waka has less than thirteen. The letter of November 18, 1869, shews that Tareha, having lost most of his lands, was intended to have others secured upon him. This letter furnishes the only light their Lordships have to shew why Tareha should have a large block to himself; but that letter (which is referred to in the agreement) favours the view that this block was allotted to him beneficially rather than the view that he took it as a trustee for others.

By the Mohaka and Waikare District Act, 1870, the fore-

going agreement was declared binding on the Government and all the persons whose names are stated in the said agreement and in the schedule thereto (s. 2); and provision is made for defining the lands to be retained by the Government and to be granted out (ss. 3 and 4), and for issuing Crown grants in favour of the persons who, in pursuance of the said agreement, are entitled to the said pieces of land in fee simple, subject to the following limitations and restrictions—then follow restrictions against alienation, charging, or incumbering in any way, except by lease for twenty-one years, and all deeds, wills, and other instruments purporting to transfer, charge, or incumber the lands except by lease are declared ineffectual (s. 5, clauses 1, 2, 4). In the event of the death of any person named in the agreement as entitled to a certificate, the Native Land Court is empowered to ascertain who ought to succeed him as Crown grantee (s. 5, clause 3).

What was actually done under this Act does not appear. It was repealed by the Repeals Act, 1878, and the natural inference would be that it had been carried out and was no more wanted. But the Native Lands Amendment Act, 1881, which will be referred to hereafter, shews that grants had not even then been issued to all the persons entitled to them under the agreement of June 13, 1870. The Act of 1870, although repealed, is very important as throwing light on that agreement.

The terms of the agreement itself shew that the persons to whom lands were to be granted were to derive their title from the Crown; the Act says the grants were to be to them in fee simple—an expression quite inapplicable to lands held by native custom. All the blocks except Kai Waka were to be granted to more than ten persons. There is no reference to any native custom, and the trust referred to in the agreement does not point to any definite class of persons, but to "the manner provided or to be provided by the General Assembly for native lands held under trust." The trusts, therefore, must be found in some Act of the General Assembly, and cannot be got at by reference to native customs, or to enactments relating to native lands generally. As will be seen presently, trusts of lands are

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recognised in New Zealand; but their Lordships have not been furnished with any materials for coming to the conclusion that the General Assembly has ever declared that the lands mentioned in the agreement are subject to any trusts in favour of the appellants. The Act of 1870 plainly treats the persons named in the schedule to the agreement, and if dead then their successors, as entitled to grants in fee simple, but subject to the restrictions mentioned in s. 5.

In 1880 the Chief Tareha died, leaving a will devising his lands to the respondents and four other natives.

In 1881 a Colonial Act called the Native Land Acts Amendment Act, 1881, was passed to supply certain omissions in the Acts relating to native lands. Sects. 7 to 9 relate to the Mohaka and Waikare district. Sect. 7 refers to the Order in Council of January 12, 1867, and the formation of the said district, and to the agreement of June 13, 1870, and the Act of 1870 already mentioned, and states that the lands to be retained by the Government had been surveyed, and were by that Act vested in the Crown, and that the Act of 1870 had been repealed. The section then proceeds as follows: "And whereas it is expedient to make provision for enabling the Governor to issue grants in favour of the persons who in pursuance of the said agreement are entitled to the residue of the said lands, be it therefore further enacted—on the application of the Native Minister the Land Court may in its ordinary form of procedure inquire and determine who are the persons entitled as aforesaid, and may issue certificates in accordance with such determinations, and may fix therein the dates on which the legal estate therein should respectively vest." Sect. 8 provides for the issue of Crown grants in accordance with the certificates. The grants are to be issued "in favour of the persons therein respectively named, their heirs and assigns, as tenants in common, and may therein fix the date at which the legal estate therein shall vest, as set forth in the several certificates, subject nevertheless to the following restrictions and conditions." Then follow restrictions against alienation except by lease, and provisions making deeds and wills affecting the same invalid, and against charging or incumbering in any way whatever, and against

taking the lands in execution under any judgment or other process.

It appears to their Lordships plain that the persons to whom certificates were to be given and grants made under this Act were the persons named in the schedule to the agreement of June 13, 1870, and the successors of those of them who might be dead. The idea that the grantees were to hold in trust for an unascertained and practically unascertainable class of natives who were loyal in the old rebellion, or who came in and submitted within a reasonable time after January 12, 1867, appears to their Lordships too extravagant to require serious comment. The mere fact that the grantees were to hold as tenants in common goes far to negative any such idea, and would be conclusive to an English lawyer. Grants by the Crown to several persons under the Native Lands Acts repealed in 1873 made the grantees tenants in common and not joint tenants (see the Native Land Act, 1873, s. 79). The Maori Real Estate Management Act, 1867, provided for the appointment of trustees of the hereditaments of native infants, lunatics, and others under legal disability; and for the management of such hereditaments by the trustees. Trusts are also referred to in several other Land Acts; and the reference to the legal estate in the Act of 1881 merely indicates that the grantees or some of them might be trustees of their shares for other persons, and that the Legislature was only dealing with the legal title.

After this Act was passed, namely, on July 6, 1882, an order was made for the issue of a certificate to the Chief Tareha in respect of the Kai Waka block. The order was made in the presence of a chief who alleged that there were many loyal natives not named in the agreement of June 13, 1870, who claimed to be interested in the lands mentioned in it. The order was as follows:—

"'The Native Land Court Act, 1880,' and 'The Native Lands Act Amendment Act, 1881.'

"Provisional District of Hawkes Bay.

"Fee charged 1*l*. Mohaka and Waikare Districts.

"At a sitting of Native Land Court of New Zealand held

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at Napier in the said district on the 6th day of July, 1882, before F. M. P. Brookfield, Esquire, Judge, and John Gage, Assessor.

"It is ordered that a Certificate of Title to a parcel of land, portion of the said district being called or known by the name of Kaiwaka, containing by estimation 31,200 acres, should issue to Tareha Te Moananui, and that the said party should be entered in the register as the owner according to native custom of the said parcel of land as from the 12th day of September, 1870, subject nevertheless to the several restrictions set forth in the Native Lands Act Amendment Act, 1881, and that such certificate of their title be issued when a properly certified plan is sent in to the Native Land Court.

"Witness the hand of F. M. P. Brookfield, Esquire, Judge, and the seal of the Court the 6th day of July, 1882.

"F. M. P. Brookfield, Judge."

On July 10, 1882, a minute of this order was made for the issue of a certificate in favour of Tareha, and title to vest from September 12, 1870.

Statutes existed authorizing grants to be made out in the names of the persons originally entitled to them, although they might be dead (see Crown Grants Act, 1866, s. 34).

The judge who made this order wrote to the Native Minister giving a report of the proceedings before him, and stating the reasons for his judgment and what he told the chief who addressed the Court. The judge's report says: "I told him that the agreement of the 13th June, 1870, was entered into between the Government of the Colony and the natives named in it, and that it had twice been declared to be valid by Acts of Council, and that the Court could not now go behind it so as to inquire whether any error had crept into it, and that the only persons who could now be recognised as having interests in the land were those named in the agreement, or the successors of any who might now be dead." The native chiefs protested, and were told they must petition Parliament if they were advised to do so. They declined to assist the Court in any way. The names in the agreement were then read out,

and orders were made for the issue of certificates to them, the estates to be vested as from September 12, 1870, when the above-mentioned Act came into operation.

It is to be observed that the order last referred to directed that Tareha should be entered in the register "as the owner according to native custom." This looks as if the land was to be treated as native land (see the Native Land Act, 1873, s. 3). But it is plain that the judge who made the order did not suppose that the above words created any such trust as is asserted by the appellants.

On May 20, 1885, an order (called a succession order) was made by the Native Land Court in the matter of the deceased Chief Tareha, and of the application of certain natives claiming to be interested in his estate. This order is as follows: "The Court having proceeded to inquire and ascertain who ought to succeed to the lands and hereditaments for the estate therein whereof the deceased died possessed, and having made valid disposition thereof by will and having determined thereon, it is hereby certified that so far as the deceased died possessed of an estate in severalty or tenancy in common in all that parcel of land situate at Kaiwaka, and containing 31,200 acres or thereabouts, and known by the name of Kaiwaka, the boundaries and descriptions whereof are more particularly set out in the certificate of title thereof, the persons who are entitled to succeed are"—then follow six native names, including the names of the two respondents—"by virtue of the said will bearing date December 19, 1880, all aboriginal natives of New Zealand, and that they became so entitled on December 19, 1880, being the day of the death of the deceased."

This succession order is contended by the appellants to be invalid; but it is unnecessary to consider its validity; for unless Tareha was a trustee for the appellants, as they allege, the succession order may be passed over as unimportant on the present appeal.

On June 10, 1890, an Order in Council was made by the Governor giving the Native Land Court jurisdiction to determine the ownership of the said Kai Waka block and other blocks mentioned in the agreement of June, 1873; but on

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May 7, 1891, the Governor stayed proceedings thereunder by notice to the Chief Judge.

The defendants allege that on July 12, 1894, a certificate of title was issued for the Kai Waka block in the name of Tareha, and that on November 13, 1895, a grant of the said block to Tareha was issued. The certificate is not before their Lordships. The grant is set out in the record. The grant is to Tareha, his heirs and assigns, to hold to him, his heirs and assigns, for ever as from September 12, 1870, subject to the several restrictions set forth in s. 8 of the Native Lands Act Amendment Act, 1881. There is no reference to any trust or native custom.

On July 17, 1896, the plaintiffs (and appellants) commenced this action against the defendants (and respondents). By their original and amended claims the plaintiffs prayed (inter alia) that it might be declared that the lands called Kai Waka were held by Tareha as a trustee for the loyal owners thereof, according to native custom and usage the natives beneficially entitled to the said block; that an inquiry might be had as to who such persons were, and for that purpose, if necessary, a reference might be had to the Native Land Court; that it might be declared that the order of the Native Land Court of July 6, 1882, declaring Tareha to be the sole owner of the said lands according to native custom was null and void, and that the said certificate of title and the grant to the defendants were null and void; that the proceedings of the Native Land Court appointing successors to Tareha might be declared to have been without jurisdiction and void. The respondents filed a statement of defence admitting most of the facts, but denying all the trusts alleged by the plaintiffs. In October, 1896, the plaintiffs moved to have the issues of law argued prior to the trial of the action. The following were the material issues of law so raised: (1.) Did the agreement of June 13, 1870, create Tareha a trustee of the Kai Waka block, and, if so, a trustee for whom? (2.) Was Tareha beneficial owner of the said Kai Waka block, or was he a trustee for any person or class of persons under any express or resulting trust, or otherwise howsoever by virtue of the facts appearing from

the statements of claim and defence? By consent of the parties these issues of law were ordered to be argued, and were removed for argument into the Court of Appeal of New Zealand without any decision of the Supreme Court, and were argued before the Court of Appeal. The Court of Appeal on October 20, 1896, answered the above issues in favour of the respondents. On July 5, 1898, the action came on for hearing in the Supreme Court of New Zealand; and upon the answers given by the Court of Appeal to the above issues judgment was given by the Supreme Court for the respondents.

From this judgment the plaintiffs have appealed to His Majesty in Council, having obtained special leave to do so without giving any security.

The judgment of the Supreme Court was based upon two grounds, namely, (1.) that all the lands comprised in the Mohaka and Waikare District were forfeited to the Crown by reason of the rebellion, and could be retained by the Crown or granted out by it as it pleased, and that such lands were not native lands within the meaning of the Native Land Acts after the proclamation of January 12, 1867, was made; (2.) that the title of the plaintiffs or other natives to such of the lands comprised in the district as were not retained by the Crown must be decided by the terms of the agreement of June 13, 1870; and (3.) that notwithstanding the use of the word "trust" in that document, no such trust as is contended for by the appellants was created by it. Having come to this conclusion, it was unnecessary to consider any of the other questions raised.

Their Lordships concur with the Supreme Court on both the above points. Counsel for the appellants referred at considerable length to the New Zealand Native Land Acts and other Acts connected with them, namely, those of 1862, 1863, 1865, 1867, 1873, 1880, 1881, and 1886; but their Lordships are unable to see anything in them which can assist the appellants, unless they succeed in first establishing the creation in their favour of the trust on which they rely. Their ability to do this turns entirely on the clause in the agreement of June 13, 1870, in which the word "trust" occurs. Their

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Lordships have already pointed out serious difficulties in construing this clause in the manner contended for by the appellants; and their Lordships have only now to add that they are convinced by the careful judgments of the members of the Supreme Court that the construction so contended for cannot be judicially supported.

The agreement says distinctly enough who are to receive certificates of title. Grants would follow and would be issued in accordance with the certificates. The lands were to be made inalienable both as to sale and mortgage, and were to be held in trust in "the manner provided or hereafter to be provided by the General Assembly for native lands held under trust." What was meant by this is somewhat obscure; but the language does not of itself create the appellants and the other natives who were loyal in the rebellion beneficial owners of the lands which were to be allotted to the persons named in the schedule. The General Assembly have created no trust in favour of the appellants and other loyal natives, and the appellants have absolutely nothing to rely upon except the clause now referred to. The appellants' counsel felt the difficulty of establishing any such trust on the numerous allottees of all the blocks; but they contended that there was such a trust in the case of the Kai Waka block. Their Lordships see no reason for drawing any distinction in this respect between one block and another. The allottees of each block must be treated as the only persons entitled to them under the agreement.

The use of the word "trust," on which the appellants so strongly rely, is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings. This was pointed out by Lord Selborne in *Kinloch* v. *Secretary of State for India in Council* (1), where some booty was granted by the Crown to the Secretary of State "in trust" for the officers and men of certain forces. That case has no bearing on the present, except that it affords a striking example in which the position of the parties and the nature of the subject-matter shewed that even such an expression as to

(1) 7 App. Cas. 619, at p. 625.

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be held in trust for a definite class of persons did not create any equitable interest in their favour in the property so to be held. In this case the expression in the agreement of June 13, 1870, appears to their Lordships to mean no more than that if any of the lands are subject to any trust they are to be held subject to the laws regulating the conditions and trusts on which native lands are held.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs; but the respondents must bear the costs of their abandoned petition praying for the discharge of the order of July 14, 1899, giving the appellants leave to appeal without finding security.

Solicitors for appellants: *Shaen, Roscoe, Massey & Co.*

[PRIVY COUNCIL.]

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July 10, 11, 13; *Nov.* 22.

ATTORNEY-GENERAL OF MANITOBA APPELLANT;

AND

MANITOBA LICENCE HOLDERS' ASSOCIATION . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH OF THE PROVINCE OF MANITOBA.

British North America Act, s. 92, *sub-s.* 16—*Manitoba Liquor Act*, 1900—*Powers of Local Legislature.*

The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the provincial legislature, its subject being and having been dealt with as a matter of a merely local nature in the province within the meaning of British North America Act, 1867, s. 92, sub-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A. C. 348, followed.

APPEAL by special leave from a judgment of the Court of King's Bench (Feb. 23, 1901).

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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The legislature of the province of Manitoba on July 5, 1900, passed an Act known as "The Liquor Act" (63 & 64 Vict. c. 22). The preamble of the Act is in these words: "Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, therefore, &c." The enactments purport to prohibit all use in Manitoba of spirituous fermented malt and all intoxicating liquors as beverages or otherwise than for sacramental, medicinal, mechanical, or scientific purposes, and they include divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of such liquors.

On February 23, 1901, the Court, on a reference thereto by the Lieutenant-Governor in Council, expressed its unanimous opinion that the said Act was unconstitutional; that the legislature of Manitoba had "exceeded its powers in enacting the Liquor Act as a whole."

The following facts were, by the submitting Order in Council, laid before the Court for consideration in dealing with the submission.

(*a*) "That at the time of the passing of the Liquor Act there were and are now in Manitoba brewers and maltsters, duly licensed under the Inland Revenue Act of Canada and amendments, by the Government of the Dominion of Canada, to carry on the trade or business of brewers and maltsters in Manitoba, and who then were and are now engaged under their said respective licences in manufacturing malt liquors and malt both for sale within and export from Manitoba, and selling within and exporting from Manitoba malt liquors and malt;

(*b*) "That at the time of the passing of the Liquor Act there were and now are in Manitoba a number of wholesale liquor dealers, engaged in buying and selling liquors by wholesale within the province, and in importing liquor by wholesale into the province from other provinces and countries, and in exporting from such province liquor so bought and imported;"

(*c*) "That at the time of passing the said Act many trans-

actions took place and still take place in purchasing and selling liquor between residents of Manitoba and residents of other provinces and countries, both by way of import into Manitoba and export therefrom, and the Government of Canada derive revenue both from the importation of liquor into Canada and the manufacture of liquor therein."

Haldane, K.C., Colin Campbell, K.C. (*Attorney-General of Manitoba*), and *R. O. B. Lane, junior*, for the appellant, contended that the judgment should be reversed, and that the said Act should be held to be within the jurisdiction and powers of the local legislature. The matters dealt with thereby came within the classes of subjects enumerated in s. 92 of the British North America Act, and more especially in sub-ss. 13 and 16. Further, they contended that the matters dealt with thereby did not come within any of the subjects enumerated in s. 91. Also, that the Act did not conflict with any existing legislative provisions made by the Dominion Parliament, or with any provision which may hereafter be competently made thereby. Nor did it encroach upon the authority of the Dominion in any respect. It dealt with matters of a purely local nature in the province. Reference was made to ss. 91, 92, and 121 of the Act of 1867; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); a Report to Her Majesty on a reference not in a suit dated May 9, 1896; *Russell* v. *Reg.* (2); *Hodge* v. *Reg.* (3); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario.* (4)

Blake, K.C., and *Phippen*, for the respondents, contended that the Act was ultra vires the local legislature for the reasons appearing in the judgment of the Court below. It assumed to prevent, prohibit, and restrict dealings with liquor in respect of its importation, exportation, manufacture, sale, purchase, transportation, and use. Such provisions are in excess of any powers granted by s. 92, either those specifically enumerated in sub-s. 15 or those included in the general terms of sub-s. 16.

(1) [1896] A. C. 348; S.C. 5 Cart-wright, 295.
(2) (1882) 7 App. Cas. 829.
(3) (1883) 9 App. Cas. 117.
(4) [1897] A. C. 231.

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They are also in conflict with Dominion powers, among which are the regulation of trade and commerce and the raising of money by indirect taxation. The Dominion is largely dependent on the excise and customs revenue from the manufacture and importation of liquor. The Act in question trenches on this source of revenue, and thus conflicts with s. 121 of the Act of 1867. It interferes with, limits, and prohibits interprovincial export and import trade in liquor, and with the systems of trade and taxation established under its exclusive powers by the Dominion Parliament. In particular it conflicts with existing Dominion legislation now in force in Manitoba by preventing distillers, brewers, and others licensed under the "Inland Revenue Act" from trading as licensed: see 31 Vict. c. 8, and R. S. C. c. 34, s. 9. It restricts the class of buildings within which they may ply their trade, and in which they may keep their manufactured goods. It conflicts also with regulations made by the Government under the authority of the Dominion Parliament respecting the sale of methylated spirits and spirits to be used for any mechanical or manufacturing purposes. It also makes illegal bonded warehouses established under the Inland Revenue Act, and interferes with the general control by the Inland Revenue Department over the business of all licences under that Act. Reference was made to ss. 163 (*b*), 165, 174, and 175, the latter as amended by 60 & 61 Vict. c. 19, s. 8.

Haldane, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In July, 1900, an Act was passed by the Legislature of Manitoba for the suppression of the liquor traffic in that province. The Act, which is known by its short title of "The Liquor Act," was to have come into operation on June 1, 1901. Before that date, on a reference under c. 28 of the Revised Statutes of Manitoba, the Court of King's Bench pronounced the whole Act to be unconstitutional. From this decision the present appeal has been brought.

Although the questions submitted to the Court of King's Bench by the Lieutenant-Governor in Council were eleven in

number, the only one considered in the Court below, and the only one argued before this Board, was the first: "Had the Legislative Assembly of Manitoba jurisdiction to enact the Liquor Act, and if not, in what particular or respect has it exceeded its power?" To this the answer given was, "It exceeded its powers in enacting the Liquor Act as a whole." The other questions are either of an academical character or such as are material only in the event of the Act being declared partially and not wholly unconstitutional. No answer that could be given to any of those questions would be of any practical value. Their Lordships, therefore, will confine their attention to the subject to which the judgment of the Court of King's Bench and the arguments at the bar were addressed.

The question at issue depends on the meaning and effect of those sections in the British North America Act, 1867, which provide for the distribution of legislative powers between the Dominion and the provinces. The subject has been discussed before this Board very frequently and very fully. Mindful of advice often quoted (1), but not perhaps always followed, their Lordships do not propose to travel beyond the particular case before them.

The drink question, to use a common expression which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in s. 91 and assigned to the Legislature of the Dominion, or in those enumerated in s. 92 and thereby appropriated to provincial legislatures. The omission was probably not accidental. The result has been somewhat remarkable. On the one hand, according to *Russell* v. *Reg.* (2), it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order, and good government of Canada. On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the*

(1) See *Citizens' Insurance Co.* v. *Parsons*, (1881) 7 App. Cas. 96, 109.
(2) 7 App. Cas. 829.

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Dominion (1), it is not incompetent for a provincial legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic within the province, provided the subject is dealt with as a matter "of a merely local nature" in the province, and the Act itself is not repugnant to any Act of the Parliament of Canada.

In delivering the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), Lord Watson expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could not be supported under either No. 8 or No. 9 of s. 92. His Lordship observed that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13 and 16, which assigned to the exclusive jurisdiction of provincial legislatures (1.) "property and civil rights in the province," and (2.) "generally all matters of a merely local or private nature in the province." He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by the one or by the other of these heads. Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with "property and civil rights in the province." Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

The controversy, therefore, seems to be narrowed to this one point: Is the subject of "the Liquor Act" a matter "of a merely local nature in the province" of Manitoba, and does

(1) [1896] A. C. 348.

the Liquor Act deal with it as such? The judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held, further, that there might be circumstances (2) in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, therefore, as it stands, and the Report to Her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view," to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

The Liquor Act proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Manitoba, except under a licence or as otherwise

(1) [1896] A. C. 348. (2) See Report to Her Majesty, May 9, 1896.

J. C. 1901 ATTORNEY-GENERAL OF MANITOBA v. MANITOBA LICENCE HOLDERS' ASSOCIATION.

specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Manitoba, it shall not affect and is not intended to affect bonâ fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all bonâ fide transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the province of Manitoba, and indirectly at least with business operations beyond the limits of the province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion removed by the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (1) Having attentively considered the very able and elaborate judgments of Killam C.J. and Bain J., in which Richards J. concurred, and the arguments of counsel in support of their view, their Lordships are not satisfied that the Legislature of Manitoba has transgressed the limits of its jurisdiction in passing the Liquor Act.

Their Lordship will, therefore, humbly advise His Majesty that the judgment of the Court of King's Bench of the province of Manitoba dated February 23, 1901, ought to be discharged, and that in lieu thereof there ought to be substituted the following answers to the eleven questions submitted to it:—

1. In answer to the first question: That the Legislative Assembly of Manitoba had jurisdiction to enact the Liquor Act.

2. In answer to the questions numbered 2 to 11 both

(1) [1896] A. C. 348.

inclusive: That no useful answer can be given to these questions.

There will be no costs of this appeal.

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ATTORNEY-GENERAL OF MANITOBA v. MANITOBA LICENCE HOLDERS' ASSOCIATION.

Solicitors for appellant: *Harrison & Powell.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

Ex parte ALDRED.

J. C.*
1901
July 24.

IN APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY IN THE ISLE OF MAN.

Practice—Criminal Conviction—Special Leave.

Special leave to appeal is not given in a criminal case where the sentence was founded on the verdict of a jury, and there was evidence for the jury, and no special matter sufficient to countervail it.

THIS was a petition for special leave to appeal from a conviction and sentence on November 14, 1900, in the Isle of Man. It stated that the petitioner was an auditor of Dumbell's Banking Company, Limited, and was convicted of having been party to the issue of false balance-sheets of that company between July, 1898, and August, 1899. The ground of the application was that there had been misdirection, that there was no evidence to support the charge against him, but that there was evidence to the effect that he honestly and reasonably believed that the balance-sheets were true and accurate accounts of the bank's real position, and that he had no fraudulent intention.

Muir Mackenzie, for the petitioner, referred to the evidence as insufficient to justify the conviction. He was found "guilty in a minor degree," and recommended to mercy. He had served the sentence, and the object of the appeal was in order that his

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

J. C. 1901 ALDRED, *Ex parte.*

status as an accountant should be restored, so that the Institute of Chartered Accountants should not expel him from being a member thereof.

Charles Matthews and *Carrington*, for the Government of the Isle of Man, were not heard.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships are of opinion that, whatever may be said about this matter—and there are some observations, undoubtedly, which commend themselves to their minds—there is nothing here which can justify any Court in setting aside the conviction. There is no fact established sufficient to countervail the solemn determination of the judges and the jury here. It would be impossible to set aside this conviction on such grounds as have been brought forward. There appears to have been evidence for the jury. Whether or not their Lordships would have formed the same opinion, and found the same verdict, is not the question. If they would not, that is not enough to set aside the verdict of the jury which has been arrived at; and their Lordships, therefore, must decline to advise His Majesty to grant leave to appeal.

Solicitors for petitioner: *Jaques & Co.*

Solicitors for the Government of the Isle of Man: *Light & Galbraith.*

[PRIVY COUNCIL.]

BURLAND AND OTHERS . . . . . DEFENDANTS;

AND

EARLE AND OTHERS . . . . . PLAINTIFFS.

J. C.*
1901
July 16, 17, 19; Nov. 9.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Law of Canada—Canadian Act 27 & 28 *Vict. c.* 23—*Powers of Company—Formation and Investment of Reserve Fund—Purchase by Director and Resale to Company.*

It is an elementary principle that a Court has no jurisdiction to interfere with the internal management of companies acting within their powers.

The company must sue to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must shew that the acts complained of are either fraudulent or ultra vires.

A company formed by letters patent under Canadian Act 27 & 28 Vict., c. 23 is not bound to divide all its profits on each occasion amongst its shareholders. It can legally reserve any portion thereof at its own discretion, and a Court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit of profit and loss or carried to credit of a reserve, it may lawfully, in the absence of any express power, be invested on such securities as the directors may select subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make. It is not ultra vires for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investment so long as it appears to be bonâ fide.

Where a director purchased property without mandate from the company and under such circumstances as did not make him a trustee thereof for the company, and thereafter resold the same to the company at a profit:—

Held, that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made.

In re Cape Breton Co., (1884) 26 Ch. D. 221 and (1885) 29 Ch. D. 795, approved.

CONSOLIDATED APPEAL and cross-appeal from a decree of the Court of Appeal (Nov. 13, 1900) varying a decree (May 23,

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C. 1901

BURLAND v. EARLE.

1899) by the Chief Justice of the Queen's Bench Division of the High Court for Ontario.

The respondents, as shareholders in the American Bank Note Company, sued in December, 1897, under the circumstances stated in their Lordships' judgment, to compel the defendants, as directors, and the company to distribute in dividends a rest or reserve fund which, during a long course of years, had been accumulated. By an amended statement of claim on May 6 1898, they prayed, inter alia, for (1.) a declaration that certain investments of the company's funds in the sole name of Burland (a director), and also investments thereof by way of loan or otherwise, were illegal and ultra vires of the company, and that Burland be ordered to restore, with interest, all sums received by him for the purpose of such investments; (2.) a declaration that Burland purchased the plant and material of the insolvent Burland Lithographic Company as a trustee for the American Bank Note Company, and an order directing him to account for the profit made by him out of its resale to the company; (3.) a declaration that certain salaries had been paid wrongfully, and an order that they be refunded.

The principal question in the appeal was whether the majority of the shareholders have a right to retain the balance of profit and loss available for dividends instead of distributing the same as dividends, and as a consequence of such retention to invest such balance in shares and bonds of joint stock companies and other investments foreign to the business of the company.

The Chief Justice held that there was no express power given to the company to establish a reserve fund, and that the company had no implied power to do so, nor to invest such reserve fund upon securities or at all; but that it was unnecessary to determine whether the company had or had not such power, because no reserve fund was ever in fact set apart by the directors or the company, and that the sums at the credit of the profit and loss account in the balance-sheets were in reality net profits and as such available as dividends, and were applicable for that purpose only having regard to the powers of

the company and the rights of the shareholders, and ought to have been so applied.

He accordingly ordered distribution, "retaining for the use of the company a reasonable sum for contingencies," the amount thereof to be decided by himself in case of the parties differing about the same. The Chief Justice further directed that the defendant G. B. Burland should account as trustee for his dealings and transactions with the net profits of the company during the six years prior to suit; and also for all profits made by him from the sale by him to the company of the plant, &c., of the lithographic company purchased by him.

On November 13, 1900, the Court of Appeal decreed—(1.) That at the commencement of this action the sum of $264,167.21, being the amount shewn by the balance-sheet for the year 1897 as at credit of profit and loss account, less the sum of $44,022.32, which then formed the reserve fund, was undrawn profits and as such was available for dividends, and should be so applied; but this is not to affect the right of the directors and shareholders of the said company to appropriate out of future profits such further reserve as the needs of the company may properly require. (2.) That the defendants do forthwith proceed to take the proper steps for the distribution of the said undrawn profits in dividends among the shareholders. (3.) That the defendant George B. Burland is liable to account to the defendant company for his dealings and transactions with its net profits which, during the period of six years prior to the commencement of the action, have come to his hands as trustee for the company. (4.) That the defendant George B. Burland is liable to account for and pay over to the company all the profits made by him from the sale by him to the company of the plant, machinery, and materials of the Burland Lithographic Company, together with interest thereon. (5.) That the defendant George B. Burland is trustee for the company of and liable to account for all such parts of its net profits as are now held by him or invested in his name, or which he has received and converted to his own use. (6.) That the defendant George B. Burland is liable to account for and pay over to the company all moneys, with interest thereon,

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charged by him in respect of a loan made to one Bennett, unless he shall establish upon the reference hereinafter directed that the loan was made by the company. (7.) That the defendant George B. Burland is liable to account for and pay over to the company all sums which, since April 24, 1888, he has withdrawn from the said defendant company as salary in excess of the sum of $12,000 per annum. (8.) That the defendant Jeffrey H. Burland is liable to account for and pay over to the company all sums of money which he has withdrawn from the company as salary since May 28, 1895. (9.) An account of what is due from the defendants George B. Burland and Jeffrey H. Burland to the company, having regard to the declarations aforesaid. (10.) An injunction against the future employment of the net profits and earnings of the said company in the purchase of shares of the capital stocks of banks and other companies, and from using any portion thereof for the purpose of making loans to persons or corporations, and from in any way dealing with the said net profits already earned otherwise than in accordance with this judgment. (11.) An injunction against the defendant George B. Burland from investing in his own name or personally controlling any portion of the earnings or moneys of the company, or from dealing with the same otherwise than in accordance with the provisions of the judgment. (12.) and (13.) related to costs.

Blake, K.C., and *R. C. Smith, K.C.*, for the appellants, contended, with regard to the main question of the reserve fund, that the Court of Appeal was right in holding that the power to create it existed in the company; but that the amount thereof was a question of internal management and policy to be decided by the directors or a majority of the shareholders acting in the legitimate exercise of their judgment. The company was absolute owner of all its profits, and incident thereto had the legal right to decide whether they should be distributed or reserved. The Court, in the absence of conduct amounting to fraud or oppression, had no right or duty of interference. The company was empowered to make by-laws,

and reference was made to No. 13, which authorized the directors, subject to approval of a general meeting, to create a reserve fund. In the case of this company the creation of a reserve had been its settled policy for thirty years, and had never been objected to by any shareholder, but had been voted for by the respondents.

There was no case of hardship. Reasonable dividends had not been withheld; and even if they had been, it would primâ facie be a matter of internal management and policy, of which the majority of the shareholders are the judges. Reference was made to Brice on Ultra Vires, 3rd ed. p. 349; *Stringer's Case* (1); Lindley, 5th ed. p. 430. With regard to the investment of the reserve fund, it was contended that the power to invest was incident to the power to accumulate, and it was a part of internal management to invest in such securities as could be easily realized.

With regard to Burland's sale to the company of certain assets of an insolvent company purchased by him, it was contended that he did not act in any fiduciary character in making the purchase from the liquidator. There was no concealment. The price paid at the purchase and the price charged at the resale were known. The evidence shews that he bought as a creditor of the insolvent company to protect himself from loss, not with the intention of reselling to the company of which he was director. The company had not merely adopted the purchase, but it had resold on its own account. It was too late now to question the transaction. Even if the company had been entitled to rescind at any time, it never was entitled to affirm the transaction and at the same time to compel the vendor to accept a price less than that which had been stipulated. It was further contended that the appellant ought not to have been ordered to account for and pay over to the company all sums of money received by him since April 24, 1888, as salary over and above the stipulated amount thereof. He was a member of the staff of the company, and as such was within the meaning of a resolution of that date which authorized the payment of the sums which he had received,

(1) (1869) L. R. 4 Ch. 475.

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and the company had for a series of years acquiesced in such payments.

Haldane, *K.C.*, and *Chrysler*, *K.C.*, for the respondents, contended that as a matter of fact a reserve fund had not been created, and that the accumulated amount standing to credit of the profit and loss account ought to be distributed as dividends. But assuming that the amount just mentioned was in reality a rest or reserve fund, it was contended that its formation was beyond the powers of the company or its directors. There was no express power in the Act under which this company was incorporated, or in the charter which issued thereunder, which authorized it to establish or accumulate a reserve fund, or to invest any of its capital in any business or enterprise save and except that described in its charter. See Canadian Act 27 & 28 Vict. c. 23, and the powers enumerated in s. 1. Prior to the British North America Act, 1867, the general Acts of the Province of Canada, including 27 & 28 Vict. c. 23, applied, not to trading companies generally, but only to manufacturing, mining, and other companies, including those within sub-ss. 8 and 9 of s. 1. After 1867, see Dominion Joint Stock Companies Act (32 & 33 Vict. c. 13), ss. 3 and 56, which did not repeal the Act of 1864 so far as regards companies already incorporated thereunder. This company was therefore subject to the general provisions contained in s. 5 of the Act of 1864, sub-ss. 1–34, which are recited in the company's charter. Sub-s. 7 authorized by-laws, and by-law No. 13 authorized a reserve fund, subject to the approval of a general meeting. But it was never acted upon. No reserve account was opened, and no reserve fund was alluded to in the annual balance-sheets or reports. It was contended that the company had no power to create a reserve fund either by by-law or otherwise. In England the general Acts under which nearly all companies are incorporated give power to create a reserve fund. See Companies Clauses Act, 8 Vict. c. 16, s. 122; Companies Act, 1862 (25 & 26 Vict. c. 89), Table A, 74. There is no corresponding provision in any Act applicable to this company, and accordingly the power does not exist. Even if the power to create a reserve fund exists, there is no foundation

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for any power to invest it except in the business of the company. It was contended that the primary object of a manufacturing company such as this is to earn and pay dividends, and a majority of the shareholders have no power to divert to other purposes a fund applicable thereto. The minority have a right, under the circumstances of an improper and oppressive use of their powers by the majority, to bring this suit: see *Atwool* v. *Merryweather* (1); *Russell* v. *Wakefield Waterworks Co.* (2); *Mason* v. *Harris* (3); Lindley, b. 3, c. 2, s. 2.

With regard to the purchase by the appellant Burland of the insolvent lithographic company's plant and its resale at a profit to this company, they contended that the finding of the Court of Appeal was right, that the appellant purchased with a view to the resale, that he must be deemed to have purchased as trustee or agent for the company, and that, under the circumstances, it was his duty to buy for the company and not for himself. It was his duty to disclose to the company and his co-directors that he had bought for $21,564 that which he sold for $60,000. They also contended that the payments over and above the stipulated salaries were not duly authorized.

Blake, K.C., replied.

1901 Nov. 9.

The judgment of their Lordships was delivered by

LORD DAVEY. The appellants and respondents in these two appeals, which have been consolidated, are alike shareholders in a joint stock company, called the British American Bank Note Company. In this judgment the term "appellants" will mean the appellants in the first and principal appeal who are defendants in the action, and "respondents" will mean the respondents in the same appeal and plaintiffs in the action.

The company was incorporated by letters patent dated June 16, 1866, under the provisions of an Act (27 & 28 Vict. c. 23) of the old Province of Canada. The objects for which the company was formed were "to engrave and print bank notes, debentures, bonds, postage and bill stamps, and bills of exchange, and to carry on all other branches incidental thereto."

(1) (1867) L. R. 5 Eq. 464, n. (2) (1875) L. R. 20 Eq. 474.
(3) (1879) 11 Ch. D. 97, 107.

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The capital of the company was originally $100,000, divided into shares of $100 each, but was subsequently increased to $200,000, of which $170,000 only has been issued.

By s. 1 of the Act referred to, provision is made for the incorporation by letters patent of joint stock companies for the purpose (inter alia) of carrying on any kind of manufacturing business, and by s. 5 it was declared that every company incorporated under the authority of the Act should be subject to the general provisions set out in sub-ss. 1 to 34 thereof. Sub-s. 7, so far as material, is as follows:—

"7. The directors of the company shall have full power in all things to administer the affairs of the company, and may make or cause to be made for the company any description of contract which the company may by law enter into; and may from time to time make by-laws not contrary to law, to regulate (inter alia) the declaration and payment of dividends, the number of directors, their term of service, the amount of their stock qualification, the appointment, functions, duties and removal of all agents, officers, and servants of the company, the security to be given by them to the company, their remuneration and that (if any) of the directors, the time at which, and the place or places where the annual meetings of the company shall be held and where the business of the company shall be conducted."

The Act contains no express provisions as to the formation of a reserve fund, or as to the investment or application of the undivided profits of the company.

Shortly after the formation of the company the shareholders made a number of by-laws, of which the following are material for the purpose of this litigation:—

"9. The shareholders of the company may, at any general meeting of the company, vote and award to the directors of the company, such compensation as they may think proper.

"10. At all meetings of the company every shareholder shall be entitled to as many votes as he may own shares in the company, and may vote by proxy; but no shareholder shall be entitled to vote unless he has paid all calls in respect of his shares.

"11. The directors shall have the management of the affairs of the company, the appointment, control, and removal of all the officers and employees of the company, and shall, from time to time, regulate their several duties and remuneration.

"12. At every annual general meeting the directors shall present a report and abstract of the accounts of the company, a concise statement of their affairs, and a true and succinct statement of their assets and liabilities; and, if they deem fit, shall recommend the declaration of a dividend of so much per cent. on the stock out of the earned profits of the company; and in the interval between the annual general meetings of the company, the directors may, at any regular meeting, declare a dividend, whenever an actual cash balance in the hands of the secretary-treasurer from the earned profits of the company shall, in their judgment, warrant the payment of such dividend.

"13. The directors may set apart any portion of the profits for a reserve fund, subject to the approval of a general meeting, or to the appropriation of such sum by such meeting to any other purpose.

"14. The number of directors shall never be less than three, nor more than six. Every new board of directors, as soon as elected, shall elect a president and a vice-president; they shall also elect the president or vice-president, or any director, to be at the same time manager, and if any of the places of these officers become vacant, they may be filled by the board electing others in their place.

"16. At every board meeting three directors shall constitute a quorum. The president shall preside, in his absence the vice-president, and, failing both, any director. The president or chairman, as a director, shall have one vote."

The company was formed by the union of two groups, one represented by the appellant George B. Burland (who is hereafter referred to as Burland), and the other by a Mr. Smillie and the respondent Earle. Mr. Smillie was the first president, and Burland and the respondent Earle were first directors. Mr. Smillie retired from the company in 1881 and sold his shares. Burland from time to time increased his holding, and at the date of the commencement of the action he held 1077

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shares. He was also the president and manager of the company.

The plaintiffs and respondents hold between them 433 shares. The respondent Earle continued on the board of directors (with two short intervals) until the year 1890, when he resigned. The respondent Mrs. Cunningham sues as the administratrix of James Cunningham, deceased, who was at one time the auditor, and from 1887 until his death in 1892 was a director of the company. The respondent Thomas J. Gillelan was from the year 1892, and at the commencement of the action, a director of the company.

The company's business has been extraordinarily successful. In some years it has paid to its shareholders a dividend exceeding 100 per cent., and the average of the dividends paid during the thirty years of its existence prior to the commencement of the action is said to exceed 40 per cent. per annum. In addition to the dividends so paid, the company has accumulated undivided profits to the amount (at the commencement of the action) of $264,167. This sum was not formally carried to the credit of a rest or reserve fund, but stood to the credit of the profit and loss account of the company. Shortly before the commencement of the action the company lost a valuable contract with the Dominion Government. The result was a serious diminution of the profits of its business.

The action was commenced by the respondents on December 7, 1897. By their amended statement of claim they prayed for a declaration that the accumulation by the defendants of a surplus or reserve fund was ultra vires, and for an immediate division and distribution amongst the shareholders of all sums of money accumulated and retained as a reserve fund over and above the authorized capital stock of the company, and various other items of relief. Their Lordships will confine their attention to the points which have been discussed on these appeals. These are—(1.) the formation of the rest or reserve fund; (2.) the investment of it; (3.) a claim by the respondents to treat Burland as a trustee of the plant and material of a certain insolvent company called the Burland Lithographic Company, which he purchased at a sale by auction and resold at an

enhanced price to this company, and to make him account to the company accordingly for the profit made by the resale; (4.) a question as to certain sums drawn as salaries by Burland and the appellant J. H. Burland.

It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should primâ facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* (1) and *Mozley* v. *Alston* (2), and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier* v. *Hooper's Telegraph Works*. (3) It should be added that no mere informality or irregularity which can be remedied

(1) (1843) 2 Hare, 461. (2) (1847) 1 Ph. 790.
(3) (1874) L. R. 9 Ch. 350.

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by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish L.J. in *MacDougall* v. *Gardiner*. (1)

There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote. This is shewn by the case before this Board of the *North-West Transportation Co., Ld.* v. *Beatty*. (2) In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained.

If these elementary considerations are borne in mind, the solution of the principal questions arising in these appeals will not present any real difficulty. It was originally maintained by the plaintiffs that art. 13 of the by-laws was beyond the powers of the company, or, in other words, that a company formed by letters patent under the Act 27 & 28 Vict. c. 23 was bound to divide all its profits on each occasion, and could not by law reserve any portion thereof either to meet contingencies, or for future division, or for any other purpose of a reserve fund. The Chief Justice who tried the action held that the company had no implied power to create a reserve fund, or, "least of all," to invest a reserve fund upon securities; but he thought the question immaterial, as the company had not, in his opinion, set apart or appropriated a reserve fund, and he held that the whole of the sum to the credit of profit and loss ought to be distributed amongst the shareholders. But in his formal judgment or decree he allowed the company to deduct and retain "a reasonable sum for contingencies, the amount, in case the parties differed, to be settled by the Chief Justice." In the Court of Appeal it was held that it was within the

(1) (1875) 1 Ch. D. 13, at p. 25. (2) (1887) 12 App. Cas. 589.

powers of the company to set apart "a fair and reasonable sum" out of the profits as a reserve fund, and it was the duty of the directors to invest it in a proper manner. But the learned judges seem to have thought that the company had not exercised the power except as to a sum of $44,022, and they held that the balance in question, after deducting that amount, was distributable amongst the shareholders. In their formal judgment the Court inserted a saving for the right of the directors and shareholders to appropriate out of future profits "such further reserve fund as the needs of the company may properly require."

Their Lordships are not aware of any principle which compels a joint stock company while a going concern to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a "fair" or "reasonable" sum to retain undivided, or what reserve fund may be "properly" required. And it makes no difference whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. These are questions for the shareholders to decide subject to any restrictions or directions contained in the articles of association or by-laws of the company.

If the company may form a reserve fund or retain a balance of undivided profits, it must, it would seem, have power to invest the moneys so retained. The junior counsel for the respondents contended that the company, in the absence of express power to invest, could employ the money only in its own business. This contention has no support either in principle or in authority, and, if it were sound, the objects for which a reserve fund is needed would in many cases be defeated. The business of this company affords a cogent instance. In order to obtain a Government contract, it may be called upon to make a large deposit, or purchase new and expensive plant.

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It has no power to borrow, and, if it had no rest or reserve fund, it would have no funds out of which to make the necessary expenditure. Upon what securities, then, may the company invest its undivided profits or reserve fund? It is conceded at the bar that the company is not confined to such investments as trustees are authorized to make. The answer, therefore, can only be that the reserve fund may lawfully be invested on such securities as the directors may select subject to the control of a general meeting.

The annual accounts of the company from the year 1873 onwards are in evidence. They consist of a profit and loss account and a balance-sheet. These accounts were regularly placed before the general meeting. The balance-sheets shew under a separate heading the investments from time to time held by the company, consisting for the most part of bank shares and mortgages. It is not for their Lordships to judge of the propriety or sufficiency of these investments. It may have been expedient for business reasons for the company to hold an interest in the various Canadian banks. The investments when made reappear in subsequent balance-sheets, and seem to have been of a permanent character. There is, therefore, no ground for the suggestion of the directors using the reserve fund for the purpose of trafficking or speculation in stocks and shares.

The investments were wholly or for the most part made in the name of Burland alone. This was, for obvious reasons, unwise and imprudent; but it must have been within the knowledge of the respondent Earle, the late Mr. Cunningham, and the respondent Gillelan, and no complaint or remonstrance seems to have been made until the institution of the present suit. Burland is of course bound to account for all the moneys of the company come to his hands. Very full accounts are directed by the judgment of the Court of Appeal, including special directions as to a loan made to one Bennett, with respect to which Burland is charged with foisting upon the company a bad debt of his own. There is no appeal from this portion of the judgment, and the accounts and inquiries will be prosecuted accordingly. Mr. Haldane asked for some injunc-

tion with respect to these matters, but did not make clear to their Lordships the form or extent of the injunction to which he considered his clients were entitled. The Court of Appeal granted an injunction to restrain the appellants and the company from employing the net profits and earnings of the company already, or which may hereafter be, earned in the purchase of shares of the capital stocks of banks or other companies, and from using any portion of the net earnings and profits for the purpose of making loans to persons or corporations, and also an injunction to restrain the appellant Burland from investing in his own name or "personally controlling" any portion of the earnings or moneys of the company, or from dealing with the same otherwise than in accordance with the judgment. For the reasons which have already been given, it is clear that so sweeping an injunction against the directors and the company cannot be maintained. And it is equally clear that the injunction against Burland cannot be maintained. It is not ultra vires for the company, if it thinks fit to do so, to invest in the name of a sole trustee, however imprudent and undesirable such a course may be. Nor can Burland as shareholder, manager, and president of the company be restrained from exercising any personal control over any portion of the company's earnings, in which, indeed, he has the largest interest.

If it appeared that under the guise of investing undivided profits or the reserve fund the directors were, in fact, embarking the moneys of the company in speculative transactions, or otherwise abusing the powers vested in them for the management of the company's business, different considerations would of course arise. But it does not appear to their Lordships that the investment of the surplus profits in bank shares or bonds of trading companies really bears that character, or was intended to be or was otherwise than a bonâ fide exercise of the powers of the company and the directors. The temporary investment of $50,000 in the Lachine Rapids Hydraulic and Land Company was more open to criticism; but on objection being made Burland took this investment to his own account, and it is a little remarkable that his having done so is now made a topic of complaint against him.

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The next matter to which the appeal relates is the sale to the company by Burland of the lithographic plant, &c., of the Burland Lithographic Company. It appears that that company had been carrying on business in Montreal, and, having become insolvent, was wound up under the provisions of the Winding-up Act. Burland was interested in the company as a stockholder and a creditor. At the public sale by the liquidator on May 10, 1892, Burland bid for and purchased all the assets of the company in four lots. The price paid by him for lot 1 was $21,564, and he shortly afterwards sold the property comprised in that lot to the appellant company for $60,000. The property, together with some other plant purchased from another company, was subsequently sold to a company formed for the purpose at an enhanced price payable in shares, which were distributed as a bonus amongst the shareholders of the company.

In these circumstances Burland has been ordered to pay to the company the sum of $38,436, being the amount of the profit realized by him on the resale. Both Courts have held that the resale was by Burland's advice and influence, and was made without disclosing to the company the price at which he had purchased. It was also held in the Court of Appeal that Burland had bought the property with the intention and for the purpose of reselling it to the company. It appears from the evidence of the respondent Earle, who was then the next largest shareholder to Burland and a director, that he was present at the sale and knew all about the transaction, and from the evidence of Gillelan that he knew what Burland had paid "very shortly after." There was evidence of two witnesses, Reinhold and Monk, that the price to the company was not unfair. But their Lordships do not think it necessary to pursue these topics, because they are of opinion that the relief prayed by the amended statement of claim, and granted in the Courts below, is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his

own mind to resell it to the company; but it was an intention which he was at liberty to carry out or abandon at his own will. It may be also that a person of a more refined self-respect and a more generous regard for the company of which he was president would have been disposed to give the company the benefit of his purchase. But their Lordships have not to decide questions of that character. The sole question is whether he was under any legal obligation to do so. Let it be assumed that the company or the dissentient shareholders might by appropriate proceedings have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit. The case seems to their Lordships to be exactly that put by Lord Cairns in *Erlanger* v. *New Sombrero Phosphate Co.* (1) In that case the bill prayed for rescission, or alternatively for the profit made by Erlanger and his syndicate on the resale to the company. Lord Cairns said (2): "It may well be that the prevailing idea in their mind was not to retain or work the island, but to sell it again at an increase of price, and very possibly to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked, to use it as they liked, and to sell it how and to whom and for what price they liked. The part of the case of the respondents which as an alternative sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of August 30, 1871, is not, as I think, capable of being supported; and this, as I understand, was the view of all the judges in the Courts below."

Reference may also be made to the judgments of Pearson J. and Cotton and Fry L.JJ. in *In re Cape Breton Co.* (3) To rescind the sale is one thing, but to force on the vendor a contract to sell at another price is a totally different thing.

The question of salaries stands in this wise. Burland's

(1) (1878) 3 App. Cas. 1218. (2) 3 App. Cas. at p. 1235.
(3) 26 Ch. D. 221; 29 Ch. D. 795.

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salary as manager was fixed in the year 1879 at $5000 per annum. This was increased from time to time to $12,000. It was not disputed that he is entitled to draw a salary of that amount, and both Courts have so held. But, in addition to this fixed salary, he has since 1888 drawn a further sum of large amount to which he claims to be entitled under the terms of a resolution of the board of directors of April 24, 1888. The Chief Justice held that the title to this increment, as well as to the fixed salary, was a question of internal management, and dismissed this part of the respondents' claim. The Court of Appeal thought that the question turned on the true construction of the resolution referred to, and, holding that Burland was not entitled to the increment under the terms of the resolution, ordered him to repay the amount thereof drawn by him since the date of the resolution. The amount which he is directed to repay on this account is $53,000 or thereabouts. Their Lordships agree with the Court of Appeal that Burland's right to retain this sum depends on the construction of the resolution, and it was so put by his counsel, Mr. Blake. The resolution is in the following terms: "The manager read letters from Mr. Goodeve and Mr. Ross with reference to their salaries and removal to Ottawa, and, having made explanations of the difficulties arising out of necessity for removal to Ottawa, it was "Resolved that the manager be requested to make the best arrangement he can with reference to the assistance given the employees, and that an increase of salary be given the staff equal to 5 per cent. on the capital stock held by each of them to meet all difficulties incurred owing to such removal."

The first observation which arises on this resolution is, that primâ facie the amount of stock held by the members of the "staff" bears no relation to the value of their services. But it was not contended that the resolution was ultra vires, and Mr. Blake was perhaps right in saying that it must be looked at in the concrete, and that the directors who passed it probably knew the holdings of the members of the "staff" and how it would work. But what is the effect and construction of the resolution? Who are the "employees"? Who are the "staff"? Are they the same or a different set of

people? And is the manager a member of the "staff" within the meaning of the resolution? This question is one of considerable difficulty. Some, but, having regard to Burland's position in the company, not much, weight is to be given to the company having acted on his construction for ten years or more. On the whole their Lordships are not prepared to differ from the Court of Appeal on this point. In the circumstances they think that Burland cannot have been intended to be included in the "staff." At best the resolution is ambiguous, and, considering Burland's position, it is not unfair to invoke against him the rule of construction contra proferentem. He was the leading man in these transactions, and it rested on him to make it clear that a resolution under which he claims a much larger benefit than anybody else should carry that meaning on the face of it.

The same question arises with regard to the appellant J. H. Burland, though in his case the sum in question is not so large. The last-named appellant was at the date of the resolution secretary of the company, and there does not seem to be any valid reason why he should not be included in the "staff." There is, however, a further point with regard to J. H. Burland. It appears that he ceased to hold the office of secretary in 1895, when he was appointed vice-president; but in the resolution appointing him to the latter office there is no mention of salary. Therefore, say the respondents, he is not entitled as vice-president to any salary, or to the increment under the resolution of April 24, 1888. There is evidence that there was a change in the distribution of offices in 1895, and that J. H. Burland continued to do the same class of work as he had done as secretary, that office having been united with that of treasurer. He was allowed by the directors to continue to draw his former salary without any observation until the commencement of the present action; and their Lordships think that the inference may fairly be drawn, from all the circumstances of the case, that he was intended to retain his salary although there was a shifting of the offices.

The order of the Court of Appeal which is under review is dated November 13, 1900. The declarations and directions

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contained in it are conveniently divided into numbered paragraphs. The result of their Lordships' judgment on the first and principal appeal may be stated thus: Paragraphs 1, 2, 4, 8, 10, 11, 12, and 13 should be discharged. Paragraph 9 should be varied by substituting "defendant" for "defendants" in the third line, and omitting the words "and Jeffrey H. Burland" in the fourth line. There should be an order that the action be dismissed with costs in both Courts, so far as relates to (1.) the questions of undrawn profits and the investment of the reserve fund; (2.) the claim to the profits made by the appellant George B. Burland from the sale to the company of the plant, machinery, and materials of the Burland Lithographic Company; (3.) the claim against the appellant Jeffrey H. Burland in respect of the sums drawn by him as salary since May 28, 1895; and (4.) so far as any injunction was prayed against the defendants in the action, or any of them.

The disposal of the costs of the action involves some complication and difficulty of adjustment. By the decree of the Chief Justice the defendants were ordered to pay to the plaintiffs their costs of the action. This decree, however, was superseded by the order of the Court of Appeal. By that order (paragraph 12) Burland and J. H. Burland were ordered to pay the costs occasioned by the plaintiffs' appeal to the Court of Appeal in respect of the salaries withdrawn by them, and by (13.) so much of the costs of the plaintiffs up to and including the trial as were attributable to the question of the rights of the parties in respect of the accumulated fund, and the costs of the appeal to the Court of Appeal for Ontario (meaning apparently the whole costs of both parties of the appeal of the defendants) were ordered to be paid out of the said fund. There is no mention in the order of the Court of Appeal of the costs of the action up to trial, so far as relates to the question of salaries, the question as to the resale of the lithographic plant, and the account directed by paragraphs 3, 5, and 6. There is, therefore, no subsisting order as to the costs of those portions of the action.

The defendants have now succeeded on all questions relating to the accumulated fund and as to the sale of the lithographic

plant. On the other hand, they have failed as to Burland's salary and succeeded as to J. H. Burland's salary. It would be almost impossible to do justice by a strict apportionment of the costs of the action up to trial, and to endeavour to do so would lead to certain inconvenience and consequent expense in taxation. On the consideration of all the circumstances, their Lordships think that justice will be met by (1.) discharging all orders as to costs made in the Courts below; (2.) directing the plaintiffs to pay to the defendants two-thirds of their costs of the action up to and including the trial; (3.) directing the defendants to pay to the plaintiffs two-thirds of the costs of the plaintiffs' appeal to the Court of Appeal, which rightly succeeded as to Burland, but ought to have failed as to J. H. Burland, and the plaintiffs to pay to the defendants two-thirds of the costs of the defendants' appeal to the Court of Appeal, which ought to have succeeded except as to the directions for Burland accounting. Paragraph 14 of the order of the Court of Appeal as to subsequent costs will stand.

Their Lordships will humbly advise His Majesty that the order of the Court of Appeal be varied in the manner above stated as to substance and costs.

The respondents in the principal appeal will pay to the appellants two-thirds of their costs of that appeal, and the appellants will pay to the respondents one-third of their costs of the same appeal. The costs of the cross-appeal will be paid by the appellants therein.

In the Court below the greater part of the plaintiffs' costs up to trial and the costs of the defendants' appeal were ordered to be paid out of the accumulated fund. If the parties agree, their Lordships think it would be a proper case in which to make that order as to all the costs in the Courts below and of the principal appeal to this Board.

Solicitors for appellants: *Ingle, Holmes & Sons.*
Solicitors for respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

J.C.* 1901 Nov. 19.

McEACHARN . . . . . APPELLANT;

AND

COLTON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Covenant not to Assign a Lease without Consent of Lessor—Injunction.

A covenant by a lessee not to assign without the lessor's consent runs with the land, and applies to a reassignment to the original lessee. An injunction will lie on a threat to commit a breach of it.

Doherty v. *Allman*, (1878) 3 App. Cas. 709, followed, and held to be especially applicable under the Australian system of land resgistry.

APPEAL by special leave from an order of the Supreme Court (Aug. 15, 1900) made on a petition under the Colonial "Real Property Act, 1886," restraining the appellant from transferring a lease without the consent of the respondents.

The appellant was one of the two assignees of a lease dated July 25, 1888, and granted by Thomas Martin, deceased, to two lessees named Muirhead.

The respondents were executors and trustees under Martin's will, and registered as the proprietors of the land in question.

The covenant in the lease was that each of the lessees did thereby, for himself, his heirs, executors, administrators, and assigns, covenant with the lessor, his heirs and assigns, that the said lessees "shall not, nor will at any time during the continuance of the said term, assign, transfer, demise, sublet, or otherwise by any act or deed part with the possession of the said leased property, or any part or parts thereof, to any person or persons, company or companies, association or associations, without the written consent of the said lessor for that purpose first had and obtained, and shall not do, cause, permit or suffer to be done, any act, deed, matter or thing, either involuntarily or otherwise, whereby or by reason or means whereof the said

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

leased property, or any part thereof, can or may be assigned, transferred, demised, sublet, set or let, or the possession thereof by the said lessees be parted with. Provided, nevertheless, that the consent of the said lessor before referred to shall not be unreasonably or capriciously withheld."

In 1888 the lessees executed, with Martin's consent, a transfer of the lease to one Robb and the appellant, who became the registered proprietors thereof. In 1897 Robb and the appellant reassigned the lease to the original lessees, the Muirheads, who executed an acceptance thereof. Martin refused his consent thereto, and lodged a caveat with the registrar forbidding registration thereof. The respondents to prevent the removal of the caveat petitioned the Supreme Court that it might be continued in force as if no proceedings had been taken for the removal thereof, and for an injunction against the proposed assignment, and obtained an order to that effect. The Court observed, with regard to the remedy by injunction: "But as to land under the Real Property Act the case for relief is even stronger than it is as to land under the old system. The Court can not only act upon the conscience of the party attempting a breach of covenant not to assign; it can effectually prevent any such breach. By s. 67 the title passes, not by instrument, but by registration, and by s. 64 the Court has complete control over the register. The 21st schedule, under which these proceedings are taken, enables the Court to 'make an order establishing the right of the caveator,' and also 'an order restraining . . . . the execution or registration of any dealing with land.' (Rules 5 and 11.)"

Boucaut J. referred to ss. 69, 70, and 151 of this Act, and observed that "a registered title thus being made indefeasible with provisions which would enable the perpetration of gross fraud unless some mode were provided of summarily preventing an attempted fraud or wrong-doing, the system of caveats was devised by pt. 16, s. 191, by which any person claiming to be interested in land may lodge a caveat forbidding the registration of any treating with land."

Sir E. Carson, S.G., Lawson Walton, K.C., and *C. C. Scott*, for

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the appellants, contended that this order should be reversed. There had been no breach of covenant which on its true construction did not apply to a retransfer of the lease to the original lessees, who had been originally accepted by the lessor as suitable holders of his land, and who were not within the scope of the covenant. Both at law and in equity an assignee of a term has an old-established right to assign it, and to get rid of all liabilities thereunder: see *Valliant* v. *Dodemede* (1); *Onslow* v. *Corrie* (2); *Lekeux* v. *Nash* (3); *Taylor* v. *Shum.* (4) A covenant of this kind does not estop an assignee from setting up an assignment where it has been effected. In other words, the lessor's remedy is for its breach—that is, for damages, not by injunction: see *Paul* v. *Nurse* (5); *Williams* v. *Earle.* (6) Where an injunction is sought, the right ought to be clearly established. *M'Cormick* v. *Stowell* (7) is an authority against its existence. It was there held that the true construction of a covenant not to assign without consent does not extend so far as to prohibit a reassignment to the original lessee, for that by the lease the lessor had consented to take the lessee as his tenant for the full term mentioned therein, a consent which was available for any reassignment to him. The English cases are also to the effect that, damages being a sufficient remedy, the Court will not interfere by injunction, especially where the right is not completely established, or, as in this case, left doubtful: see *Dyke* v. *Taylor* (8), a case where an injunction was refused because no sufficient case of mischief was made out; *Corporation of Bristol* v. *Westcott* (9); Seton on Decrees, vol. i. p. 529, referring to *Donnell* v. *Bennett* (10); *Low* v. *Innes* (11); *Lehmann* v. *McArthur.* (12) Reference was also made to *In re Duggan* (13); *Treloar* v. *Bigge* (14); *Sear* v. *House Property and Investment Society.* (15)

(1) (1742) 2 Atk. 546.
(2) (1817) 2 Madd. 330.
(3) (1745) 2 Str. 1221.
(4) (1797) 1 B. & P. 21.
(5) (1828) 8 B. & C. 486.
(6) (1868) L. R. 3 Q. B. 739.
(7) (1885) 138 Mass. 431.
(8) (1861) 3 De G. & J. 467.
(9) (1879) 12 Ch. D. 461.
(10) (1883) 22 Ch. D. 835.
(11) (1864) 4 D. J. & S. 295.
(12) (1868) L. R. 3 Ch. 496.
(13) (1882) 2 N. Z. L. R. 144.
(14) (1874) L. R. 9 Ex. 151.
(15) (1880) 16 Ch. D. 387.

Warrington, K.C., Marshall Hall, K.C., and *Terrell*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that this is a clear case. They have listened to a very able and learned argument on behalf of the appellant. It was contended in the first place that there has been no breach at all, and that the covenant in question cannot apply to a reassignment to the original lessees. Why not? It is admitted that the covenant runs with the land. It cannot be disputed that the present tenant is bound by the covenant. He now proposes to assign the lease to persons who have admitted in writing that if the lease falls into their hands they will not be able to pay the rent. Why should the circumstance that those persons were accepted as tenants some time ago, when they were, or were supposed to be, in a good financial position, make any difference? The covenant is quite plain. It is that the lessee, the person who for the time being stands in that relation to the lessor, shall not assign to any person without the lessor's consent. The attention of their Lordships has been called to an American decision for the purpose of shewing that the original lessee was not within the scope of such a covenant. With the utmost respect for the Court that pronounced the decision, their Lordships are unable to accept it as an authority for that proposition.

Then it was said that this was not a case for an injunction. Again, why not? The appellant threatens to commit a clear breach of a plain contract expressed in a negative form.

According to the doctrine expounded by Lord Cairns in *Doherty* v. *Allman* (1), that is a case in which the Court of Chancery in this country would not hesitate to grant an injunction. The remedy by injunction seems to be all the more necessary in Australia, because, if the assignee gets on the register, very serious mischief may be done, as the learned judges of the Supreme Court have pointed out.

Lastly, it was urged that the injunction was not in proper

(1) 3 App. Cas. at pp. 719–20.

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form. The exact form in which it was contended it ought to be granted, if granted at all, was not very clearly explained. It appears to their Lordships that the injunction is perfectly right; if confined to the past it would be futile. It is in the very words of the covenant, and there is reserved liberty to apply, so that there will be an opportunity of taking the opinion of the Court cheaply and expeditiously, if any question hereafter arises as to the propriety of the lessor withholding his consent in any particular case.

Their Lordships do not think it necessary to go further into the case, because they adopt without reserve or qualification the reasons of the learned Chief Justice and his colleagues, and and for those reasons they think the appeal ought to be dismissed. It would serve no useful purpose to repeat those reasons or to restate them in a different form.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be dismissed, and the appellant must pay the costs.

Solicitors for appellant: *Snow, Fox & Higginson.*
Solicitor for respondents: *Horace W. Chatterton.*

[PRIVY COUNCIL.]

D. F. MARAIS *v.* THE GENERAL OFFICER COMMANDING THE LINES OF COMMUNICATION AND THE ATTORNEY-GENERAL OF THE COLONY.

J. C.*
1901
Nov. 5;
Dec. 18.

Ex parte D. F. MARAIS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Special Leave to Appeal—Martial Law—Civil Tribunals.

Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.

The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging.

Elphinstone v. *Bedreechund*, (1830) 1 Knapp, P. C. 316, followed.

Special leave to appeal refused from a judgment affirming the rightful custody of the petitioner by the military authority in a district in which martial law prevails.

THIS was a petition for special leave to appeal from the order of the Supreme Court set out in their Lordships' judgment.

It stated the petitioner's arrest on August 15, 1901, by the chief constable of the town of Paarl, about thirty-five miles from Cape Town, who had no warrant, and did not know the cause of arrest, but alleged that he was acting under instructions from the military authorities; that on August 18 he and his fellow-prisoners were removed 300 miles to the town of Beaufort West, and on their arrival were detained in custody; that on September 6 he petitioned the Supreme Court in Cape Town to release him on the ground that his arrest and imprisonment were in violation of the fundamental liberties secured to the subjects of His Majesty, when it appeared from

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR HENRY DE VILLIERS.

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an affidavit sworn by the gaoler of Beaufort West that the petitioner was detained by an order of the military authorities dated September 8 for contravening Martial Law Regulations, par. 14, s. 2, of May 1, 1901. The regulations are set out in the reasons given by their Lordships.

Buchanan J., in refusing the application, was stated in the petition to have held that martial law had been proclaimed in the districts both of the Paarl and of Beaufort West, that the Court ought not to go into the necessity for that proclamation nor accept any responsibility for the acts of the military authorities performed in pursuance of it, though if the petitioner had not been removed from the Paarl the Court might have inquired into the necessity for martial law in that district, that the petitioner was held in custody by an officer acting under the military authorities, and that the Court could not exercise jurisdiction over the petitioner so long as martial law lasted. In his petition the petitioner contended that he had committed no crime, otherwise that he should have been arrested and tried according to law, that the civil Courts were open for his trial, that Buchanan J. himself was announced to sit for the trial of all offenders in the district of Paarl on August 27, 1901, that his arrest, deportation, and confinement in custody by the military authorities were wholly illegal, and that he was entitled to his immediate discharge.

Haldane, K.C., and *Mackarness*, for the petitioner, submitted that leave should be given, for the question of law involved was of substantial importance. The special feature of the case was that the district where the arrest was made was undisturbed, and that civil Courts were still exercising uninterrupted jurisdiction. That being so, and it appearing that the ordinary course of law could be and was being maintained, a state of war did not exist, and martial law in that case could not be applied to civilians. Even if a state of war did exist, still the application of martial law was limited by the necessity of preserving peace and order in the district, and did not oust the jurisdiction of those civil Courts which, notwithstanding the pressure of military circumstances, were still administering

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the law of the land. There was no necessity alleged or shewn for bringing the petitioner before a military tribunal whilst a civil Court was sitting. The right of the Crown to resort to such an extremity as the proclamation of martial law was limited by necessity, and, if a civil Court was open, the Crown had no power to try an offender by a military one. [THE LORD CHANCELLOR referred to *Sutton* v. *Johnston*. (1)] That case only establishes that, on grounds of public policy, a superior officer cannot be sued by an inferior for the consequences of an act done in the course of duty or discipline, even though done maliciously. And see the dictum of Lord Mansfield C.J. to the effect that no case can occur of overpowering necessity in a well-ordered country with a regular government. Even in a remote dependency it must be extreme and imminent. A jury must decide as to its existence, which is a question of fact: see Broom's Constitutional Law, p. 734. Forsyth's Opinions, p. 198, contains a joint opinion of Sir John Campbell and Sir R. M. Rolfe as to the power of the Governor of Canada to proclaim martial law during the rebellion to the effect that the right to do so arises from and is limited by the necessity of the case. Their opinion was that, "When the regular Courts are open so that criminals might be delivered over to them to be dealt with according to law, there is not, we conceive, any right in the Crown to adopt any other course of proceeding": and see *Ex parte Milligan* (2), where it was held by the Supreme Court of the United States that Congress could not invest military commissioners with jurisdiction to try citizens for offences in a State not invaded and not in rebellion, and in which the Federal Courts were open: "The invasion must be real, such as effectually closes the Courts, and deposes the civil administration." Reference was also made to the separately published report of *Reg.* v. *Nelson* (3) and *Reg.* v. *Eyre* (4), and to the case of Dr. Reinecke, a gentleman who had been arrested on August 27 at Ceres in the Cape Colony by the military under circumstances similar to those of the petitioner. The Supreme Court at Cape Town

(1) (1786) 1 T. R. 493; 1 R. R. 257.
(2) (1866) 4 Wallace, U. S. Rep. 2, 137.
(3) (1866) Cockburn's Rep. p. 69.
(4) (1866) Finlason's Rep. 74.

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had ordered the liberation of Dr. Reinecke. The case was reported in the *South African News* of September 27.

Dec. 18. The reasons for their Lordships' report that the petition should be refused were delivered by

The Lord Chancellor. This was a petition by D. F. Marais for special leave to appeal against a decision of the Courts in Cape Colony which had refused to release him from an arrest effected by the military forces of the Crown on August 15 last.

It appeared sufficiently from the petitioner's own petition, as well as the documents accompanying it, that the district in which he was arrested, and the district to which he was removed (and of which removal he also complained), was a district which had been proclaimed under martial law.

The petitioner applied to the Supreme Court complaining of his arrest and imprisonment, and on September 12 last the matter of the petitioner's arrest was brought before Buchanan J., and that learned judge, after hearing the matter, made the following order :—

"In the Supreme Court of the Colony of the Cape of
"Good Hope.
"Cape Town, Thursday, 12th September, 1901.

"In the matter of the petition of David François Marais.

"Having heard Mr. Currey, with him Mr. S. Solomon, for petitioner, Mr. Searle, K.C., for the General Officer Commanding Lines of Communication, Cape Town, and the Honourable the Attorney-General Sir James Rose Innes, K.C.M.G., with him Mr. Ward, for the Colonial Government, upon petitioner's application for his immediate liberation and discharge, and having read the order granted on the 6th instant, calling upon the gaoler at Beaufort West to return to this Court the authority on which he detains petitioner :

"Having also read the further affidavits filed, and having heard the return, made by the Attorney-General verbally, that the gaoler who has the custody of the petitioner holds him as an officer acting under the authority and control

of the military authorities in the district in which martial law prevails:

"It is ordered that the said application be and the same is hereby refused.

"By order of the Court.

"J. H. Gately,

"Acting Registrar."

From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne, that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody.

All the persons arrested were, as appeared by the warrant under which they were arrested, charged with contravening what were called "Martial Law Regulations," which regulations are set out in the petitioner's affidavit as follows:—

"No. 14. Rebellion, Dealings with Enemy, &c.

"Notice is hereby given that from and after the 22nd April, 1901, all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails:—

"(1.) Be actively in arms against His Majesty, or

"(2.) Directly incite others to take up arms against His Majesty, or

"(3.) Actively aid or assist the enemy, or

"(4.) Commit any overt act by which the safety of His Majesty's forces or subjects are endangered,

shall immediately on arrest be tried by a military Court convened by authority of the General Commanding-in-Chief of His Majesty's Forces in South Africa, and shall on conviction be liable to the severest penalties. These penalties include death, penal servitude, imprisonment and fine.

"Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a military Court."

Under these circumstances their Lordships were appealed to

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to give special leave to appeal, and Mr. Haldane, on behalf of the petitioner, was fully heard on November 5 last.

The only ground susceptible of argument urged by the learned counsel was that whereas some of the Courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil Courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.

The question was as fully argued before their Lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830.

In *Elphinstone* v. *Bedreechund* (1) the Supreme Court at Bombay had given a large sum as damages against the appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poonah, but the great battle of Kirkee had been fought, and Poonah had been taken possession of by the British forces. The treasure was seized on July 17, 1818. At Poonah some Courts had been open from the previous February, and it was argued and held by the Bombay Courts that it must be held to be a time of peace, and that the military

(1) 1 Knapp, P. C. 316.

authorities were responsible in damages for seizure of the treasure.

To this the Attorney-General, Sir James Scarlett, replied, that a military commander may allow the usual Courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander; but this does not deprive the commander of his power, or free the country from military government.

Lord Tenterden in giving judgment said: "We think the proper character of the transaction was that of hostile seizure made, if not flagrante, yet nondum cessante bello, regard being had both to the time, the place, and the person, and, consequently, that the municipal Court had no jurisdiction to adjudge upon the subject," and the judgment was accordingly reversed.

The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities.

The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure. (1)

(1) [The preamble states that commissions have issued under the Great Seal "by which certaine persons have been assigned and appointed Commissioners with power and authoritie to proceed within the land according to the justice of martiall lawe against such souldiers or marriners or other dissolute persons joyning with them" as therein mentioned, "and by such summary course and order as is agreeable to martiall lawe and as is used by armies in tyme of warr to proceed to the tryall and condemnacion of

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For these reasons their Lordships advised His Majesty to refuse leave to appeal.

Solicitors for petitioner: *Charles Russell & Co.*

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such offenders, and them to cause to be executed and putt to death according to the lawe martiall.

"By pretext whereof some of your Majesties subjects have been by some of the said Commissioners put to death, when and where, if by the lawes and statutes of the land they had deserved death, by the same lawes and statutes alsoe they might and by no other ought to have byn judged and executed."

Also that offenders have escaped punishment in ordinary course of law "uppon pretence that the said offenders were punishable onelie by martiall lawe and by authoritie of such commissions as aforesaid, which commissions and all other of like nature are wholly and directlie contrary to the said lawes and statutes of this your realme."

The two concluding prayers of the Petition are as follows:—

"And that the aforesaid commissions for proceeding by martiall lawe may be revoked and annulled. And that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesties subjects be destroyed or put to death contrary to the lawes and franchise of the land."

It is matter of historical fact that there was not any state of war at the times and places of the acts complained of. The words "time of peace" are familiar in the Mutiny (now Army Annual) Act, but do not occur in the Petition of Right. —F. P.]

[HOUSE OF LORDS.]

GEORGE WHITECHURCH, LIMITED . APPELLANTS; H. L. (E.) 1901 Aug. 5.

AND

CAVANAGH . . . . . RESPONDENT.

Principal and Agent—Company—Secretary—Representations—Certification of Transfer—Estoppel.

In permitting its secretary to certify transfers of shares, a company does not authorize the secretary to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an acknowledgment for certificates which have not been lodged, the company is not estopped from setting up the true facts.

Transfers of shares in a company having been lodged with the company's secretary without the certificates for the shares, the secretary fraudulently certified upon the transfers that the certificates for the shares were in the company's office. The proposed transferee having brought an action against the company for refusing to register him as the owner:—

Held (Lord Robertson doubting), that the company was not estopped from shewing that the proposed transferor had no shares to transfer, and that the action would not lie.

Grant v. *Norway*, (1851) 10 C. B. 665, approved.

Observations upon the doctrine of estoppel by representation.

THE following statement of facts is taken from the judgment of Lord Brampton.

In May, 1899, the Innox Tannery Company, whose tanning works were at Longjumeau, near Paris, was indebted to the respondent Cavanagh, a hide merchant in Paris, in upwards of 14,000*l*., for raw hides sold and delivered. This debt had been guaranteed by one Raymond, the managing director of the company, whose offices were in Tokenhouse Yard, London. The leather manufactured by the Innox Company was for the most part consigned to the appellant company, G. Whitechurch, Limited, leather merchants at Gentilly, near Paris, for sale on commission, that company making advances to the Innox Company on such goods to the amount of 80 per cent. of their invoiced value. The registered office of the Whitechurch Company in London was in the same house as Raymond's,

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and a clerk of Raymond, named Wells, was on his recommendation appointed secretary.

Having become dissatisfied with the conduct of the Innox Company respecting his debt, Cavanagh, on May 23, 1899, lodged against the goods and moneys of that company (as well those on their own premises as those in the possession of the Whitechurch Company for sale) a French legal process called an "opposition," which operated as an attachment, stopping, so long as it existed, all dealing with the property affected by it. Knowledge of this step was telegraphed by Mr. G. Whitechurch to Raymond in London, who, with a view to bring about a withdrawal of it, had an interview with Cavanagh in Paris on May 27, when he arranged the heads of a proposed agreement between Cavanagh, the Innox Company, and himself for the withdrawal of the opposition, on terms that the Whitechurch Company should pay over to Cavanagh from time to time, in part discharge of his debt, one-half of the 80 per cent. of the advances which, under their existing arrangements, were payable to the Innox Company, and that, for ensuring to Cavanagh the remainder of his debt, Raymond should deliver to him 10,350 shares in the appellant company. This arrangement, however, was made subject to the acquiescence of the Whitechurch Company, without which it was to be a nullity.

It is worthy of note that as regards the shares it was stipulated that they should be represented by "a certified transfer" of 1100 preference "shares," described in the agreement by specific numbers, and "a certified transfer" of 9250 ordinary shares, similarly described. A meeting in Paris on Wednesday, May 31, was appointed to complete this agreement. It was further arranged with Raymond that the certificates for those shares should be forthcoming on that day. Cavanagh, in his evidence, stated that Raymond promised to send him the transfer for the shares, with the certificates for them, by that time; and Mr. C. Smith, Cavanagh's London solicitor, who attended the meeting on his behalf, deposed that before leaving London for Paris on the 29th he saw and arranged with Raymond that he should hand to him the "original certificates" in order that he might take them with

him. Smith endeavoured to make it appear that by "original certificates" he meant the "original transfers"; but he ultimately admitted that he appreciated the difference between a certified transfer and a certificate for shares, and that the latter were to be furnished to him, so that he might be in a position to produce them in Paris, and never supposed he would have to deal with certified transfers at all. Neither certificated transfers nor share certificates, however, were furnished either to Cavanagh or Smith; but, on calling on the morning of Tuesday, May 30, at the offices of Mr. Maugham, Raymond's solicitor in Paris, they learned from that gentleman that he had that morning received by post from Raymond certified transfers of the shares (which he produced) without any share certificates.

The certified transfers were two in number—the 1100 preference shares were comprised in one, the 9250 ordinary shares in the other. Each set of shares was described by specific numbers. Each transfer purported to be a transfer by Raymond to Cavanagh, and each was dated May 29, 1899, and signed and sealed by Raymond, and attested by Wells. In the margin of each transfer was the certification in question. On that of the preference shares it was as follows:—

"Coupon for 1100 preference shares in the company's office.
"George Whitechurch, Limited,"
[Affixed by rubber stamp.]
"Richard G. Wells, secretary."
[In Wells' handwriting.]

On that of the ordinary shares, it was similar in words with the substitution of "9250 ordinary" instead of "1100 preference." Later the same day Cavanagh and Smith called on Mr. George Whitechurch, who was the company's managing director, and told him they had seen the certified transfers, and that Maugham had expressed his opinion that they were in order. Whitechurch said he had heard from Raymond and knew all about it (evidently referring to a letter of May 29, 1899, from Raymond to himself), and as regarded the certified transfers he said, "they would be all in order if he was satisfied that the signatures on them were the genuine

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signatures of the secretary." "Then," said Smith, "I put it to him expressly, if he required the original certificates or scrip to be annexed to the certificate, the appointment for the next day would have to go off"; he replied, "I shall be quite satisfied if it is Wells' signature." No transfers were shewn to Whitechurch on that day, and the letter above referred to was not calculated to excite any suspicion in his mind. On the following morning, May 31, the meeting appointed for executing the agreement was held, when Mr. Whitechurch was present, but only for the purpose of giving his acquiescence, if after seeing the certified transfers he found they were, on the face of them, in order. There was no question as to the willingness of Cavanagh to sign it. The great object was to get Whitechurch to sign his acquiescence, though he was not a party to the agreement.

Cavanagh's account of this meeting was as follows: Mr. Maugham produced the certified transfers; Mr. Whitechurch looked at them, and, having done so, said they were all right, and addressing him (Cavanagh), "and all you have to do is to give the certificates to me, and I shall send them to London and you will get the fresh certificates." The agreement was then signed by the parties to it, and Whitechurch signed his acquiescence. Subsequently the transfers were signed by Cavanagh as transferee, and he took possession of them.

He then withdrew his "opposition" and sent the transfers to the Whitechurch office in London for registration and the issue of new certificates. These were refused upon the ground that Raymond was not the registered owner of the shares, and that the old certificates had not been produced for cancellation as required by the articles of association of the company. For this refusal this action was commenced.

The action was by Cavanagh against the company, claiming damages for falsely representing to him that Raymond was the registered holder of the shares, and that he held them in his own right free from incumbrance, and that he was able to transfer them to the plaintiff.

At the trial before Bigham J. the jury found that it was in the ordinary course of Wells' business as secretary to certify

transfers; that Wells by so certifying represented to the plaintiff that the company held the certificates relating to the shares numbered in the transfers, and that the certificates were in the name of Raymond; that Wells made the representation fraudulently and in the supposed interest of the company for the benefit of both Raymond and the company; that he made it in order to induce the plaintiff to alter his position to his detriment, and that the plaintiff did in consequence alter his position to his detriment. The jury also found that Whitechurch "allowed the plaintiff to think it was all right in order to induce the plaintiff to withdraw the 'opposition.'"

Bigham J. (to whom the assessment of damages was by agreement left) entered judgment for the plaintiff for 8325*l.* The Court of Appeal (A. L. Smith, Collins, and Romer L.JJ.) affirmed this decision on the ground that the company was estopped by the representations made by Wells and by Whitechurch from setting up the true facts as to the shares.

The company brought the present appeal.

March 1, 11. *Lawson Walton, K.C.*, and *Swinfen Eady, K.C.* (*William Wills* with them), for the appellants. A company by certifying a transfer does not warrant any title in the transferor, and is not estopped from shewing that he has no title: *Bishop* v. *Balkis Consolidated Co., Ld.* (1) A principal is not liable in an action of deceit for the unauthorized and fraudulent act of an agent, committed, not for the benefit of the principal, but for the agent's own purposes: *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) Here the jury found that the secretary's fraud was committed for the benefit of the company, but there was no evidence to support that finding. The secretary of a company has no authority to make a false, still less a fraudulent, representation about a transfer, and cannot bind his principals by so doing. On this principle the master of a ship, who signs a bill of lading for goods which have not been shipped, does not make the owner responsible to one who has made advances upon the bill: *Grant* v.

(1) (1890) 25 Q. B. D. 77, 512. (2) (1887) 18 Q. B. D. 714.

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Norway. (1) So in the case of a wharfinger's servant who signs a receipt acknowledging that wheat has been delivered at the wharf when it has not: *Coleman* v. *Riches*. (2) These are acts out of the scope of the agent's authority.

[They also contended that no estoppel arose upon Whitechurch's own representations.]

Rufus Isaacs, K.C., and *Lorence Ryland*, for the respondent. A principal is responsible for the wrong or fraud of his agent if committed in the course of his employment and for the benefit of the principal: *Mackay* v. *Commercial Bank of New Brunswick*. (3) The principal may not have authorized the particular act, but he has put the agent in his place to do that class of acts: *Barwick* v. *English Joint Stock Bank*. (4) The particular act may not be for the principal's benefit, but it is for the principal's benefit to have an agent to do that class of acts. In this sense the finding of the jury that the secretary's fraud was done for the company's benefit is well founded.

[They cited *Limpus* v. *London General Omnibus Co*. (5) and *Carr* v. *London and North Western Ry. Co*. (6), and also contended that the company was estopped by Whitechurch's statements.]

Lawson Walton, K.C., in reply.

The House took time for consideration.

Aug. 5. EARL OF HALSBURY L.C. My Lords, I am about to read the judgment of my noble and learned friend Lord Macnaghten, in which I entirely concur.

LORD MACNAGHTEN (as read by the Lord Chancellor). My Lords, this case has been argued very fully and very ably. Many interesting points have been discussed, most of which, I am happy to think, are not at all necessary for the determination of the matter in hand. The real question may be stated very shortly: Has the appellant company, George Whitechurch,

(1) 10 C. B. 665.
(2) (1855) 16 C. B. 104.
(3) (1874) L. R. 5 P. C. 394.
(4) (1867) L. R. 2 Ex. 259, 265.
(5) (1862) 1 H. & C. 526.
(6) (1875) L. R. 10 C. P. 307, 317.

Limited, incurred any and if any what liability by reason of representations made by its secretary, Richard G. Wells, in London, and by its managing director, George Whitechurch, in Paris?

The claim as originally presented was founded on alleged misrepresentation by the company. The action, however, was treated by the Court of Appeal and by the learned counsel for the respondent at your Lordships' bar as an action to recover damages from the company for refusing to place the respondent Cavanagh upon its register of shareholders. It was held by the Court of Appeal, and it was strenuously argued at the bar, that the appellant company was estopped by the representations of Wells and Whitechurch from denying Cavanagh's right to be placed on the register.

I quite agree with the Master of the Rolls in thinking that it is necessary to keep the two alleged estoppels distinct, and to deal with them separately.

Whatever difficulty there may be in ascertaining the precise scope and effect of the representations made by Whitechurch, there can be no doubt as to the scope and effect of the representations made by Wells. They are in writing and in a common form. There can be no question as to the meaning of the written words, except perhaps in regard to one point, which in the view I take of the case is not material.

It seems that one Raymond had undertaken to transfer to Cavanagh by way of security a large number of shares in George Whitechurch, Limited, which were of considerable value. On May 29, 1899, at Raymond's bidding, Wells, the secretary of the company, certified two transfers, one of 1100 preference shares and the other of 9250 ordinary shares in the company. The shares were each 1*l.* shares fully paid, and worth about 15*s.* apiece. The transfers were executed by Raymond as transferor. They were intended to be executed by Cavanagh, who was named as transferee. The certification on the transfer of the preference shares was in these words: "Coupon for 1100*l.* preference shares in the company's office. George Whitechurch, Limited, Richard G. Wells, Secretary."

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The certification on the transfer of the ordinary shares was in similar terms. It was common ground that the word "coupon" stood for "certificate" or "certificates," and it was not disputed that the certification was a representation that there had been lodged in the company's office certificates for the shares specified in the bodies of the transfers, such certificates being either in the name of Raymond himself, as registered owner, or in the names of registered owners who had executed in favour of Raymond transfers which had been lodged with the certificates. In the present case the jury found that the certification given by Wells imported that the shares in question were standing in Raymond's own name. It was contended that this finding was not supported by the language of the certification or by anything in the evidence. In my opinion the point is immaterial.

It turned out that no certificates had been lodged in the company's office by Raymond, nor were any certificates ever forthcoming to answer the transfers which Raymond had executed. As far as Raymond was concerned, the whole thing was a fraud. Wells was Raymond's secretary and servant as well as secretary to the company. He was Raymond's instrument in carrying out the fraud. He lied purposely for Raymond's benefit. The jury have found that Wells joined in the fraud for the benefit of the company as well as for the benefit of Raymond. There is not, however, a shadow of evidence to support this conclusion. The finding, so far as the company is concerned, must be disregarded. It only shews how little the jury appreciated the facts of the case.

Then comes the question, Is the company bound by the representations of their secretary? That must depend upon what authority the secretary had or was held out as having.

Now, the duties of a company's secretary are well understood. They are of a limited and of a somewhat humble character. "A secretary," said Lord Esher, "is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all": *Barnett* v. *South London Tramways Co.* (1) In the present

(1) (1887) 18 Q. B. D. 817.

case the secretary was not even in the pay of the company, at least not directly. The company, it seems, was provided with an office and a secretary too for 50*l.* a year by another company, which appears to have been under Raymond's control and management.

No doubt the practice of certifying transfers is a convenient one. It facilitates dealing in shares on the Stock Exchange, and so tends indirectly to increase the value of shares as a marketable commodity. But in permitting its secretary to certify transfers it cannot be supposed that a company authorizes the secretary to do more than to give a receipt for certificates which are actually lodged in the office. I cannot think that a company is estopped by the certification of its secretary if he gives a receipt or an acknowledgment for certificates which have not been lodged with him. If authority be wanted for this proposition, it seems to me that there is ample authority to be found in the case of *Grant* v. *Norway*. (1) *Grant* v. *Norway* (1) was a much stronger case than the present. There it was held that a shipowner is not bound by bills of lading signed by the master for goods not received on board. The Court declared that it could not "discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that" the master "had authority to sign such bills whether the goods were on board or not." Having regard to the authority which the master undoubtedly possesses, and the important part which bills of lading play in the commerce of the country, there was much to be said in favour of an opposite view. It was argued in *Grant* v. *Norway* (1) that the doctrine for which the shipowner was contending would go far to destroy the negotiability of bills of lading, and that as the master had an unlimited authority to sign bills for goods received, and was for some purposes regarded as the general agent of the owner, it was but just that the owner should be responsible if the master exceeded his authority or deceived third persons. But, for all that, the principle of the decision was accepted in *Coleman* v. *Riches* (2), and the decision itself has been recognised in this House as sound law: *McLean* v.

(1) 10 C. B. 665. (2) 16 C. B. 104.

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Fleming (1); and the commerce of the country has not suffered nor has the credit of bills of lading been impaired in consequence.

There is a marked difference between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made primâ facie evidence of title. If faith were not given to the solemn assertions of a company under its common seal, "it would," as Lord Cairns observed in *Burkinshaw* v. *Nicolls* (2), "paralyze the whole of the dealings with shares in public companies." A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board. A certification, in fact, is only required for a temporary purpose, to meet the exigencies of business on the Stock Exchange, which has stated days and fixed periods for the different stages of a business transaction intended to be carried out under its rules. In dealings in shares not under the rules of the Stock Exchange, a certification is really out of place. In such dealings, in the case of a purchase, the price would only be paid in exchange for the transfer and share certificate on the completion of the transaction, and not before.

Still less would a certification be required if the shares were merely intended to form a security. A good equitable charge may be created by the deposit of certificates, and, if the certificates happened to include shares which were not intended to be the subject of the security, there would be no very great difficulty in defining the extent of the proposed charge in the memorandum of deposit.

It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells' certification, in my opinion, fails altogether; and for the same reason the case founded on alleged misrepresentation by the company fails also.

(1) (1871) L. R. 2 H. L., Sc. 128. (2) (1878) 3 App. Cas. 1017.

I now come to the estoppel founded on representations made by George Whitechurch.

The position of the parties was this: Cavanagh dealt in raw hides; George Whitechurch, Limited, were leather merchants. There was an English company called the Innox Tannery, Limited, which had a tan-yard near Paris, not very far from the place of business of the Whitechurch Company. The Innox Company was in the habit of buying hides from Cavanagh, and consigning them when tanned to George Whitechurch, Limited, for sale, receiving an advance of 80 per cent. on the invoice value. The Innox Company, which practically was Raymond under another name, became largely indebted both to Cavanagh and George Whitechurch, Limited. George Whitechurch, Limited, seem to have had some security; Cavanagh apparently had none. Cavanagh kept pressing for payment. In May, 1899, Raymond made an arrangement with Cavanagh for the liquidation of his debt by a series of bills for 500*l.* each, accepted by the Innox Company, indorsed by Raymond, and falling due in weekly succession. The first two bills fell due and were dishonoured. The next step of importance was that Cavanagh, thinking that he was being tricked, obtained from the French Courts a process known as an "opposition," together with a "protective seizure." The effect of such a process is to lay an embargo on the debtor's business, without, however, giving the creditor who obtains it any priority. Then Raymond undertook to carry out another arrangement which had been suggested or proposed when the two bills were dishonoured. He agreed to give Cavanagh as security shares in George Whitechurch, Limited, to the nominal value of 10,350*l.*, and it was part of the arrangement that George Whitechurch, Limited, should in future pay half of their advances on consignments from the Innox Company to Cavanagh until his debt was liquidated.

George Whitechurch, of course, was anxious to see the "opposition" removed, and ready to fall in with the proposed arrangement if the matter was put on a satisfactory footing that promised continuance of the business. A formal deed was to be drawn up between the Innox Company, Raymond, and

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Cavanagh; and George Whitechurch was to add his signature in order to testify the acquiescence of his company in the arrangement. That being the position of affairs, we now come to the two meetings on the 30th and 31st of May, 1899, at which representations are said to have been made by George Whitechurch which created an estoppel against his company. The interviews took place between Cavanagh, his solicitor, Mr. Charles James Smith (of the firm of Smith & Hudson, Mincing Lane, London), and Mr. George Whitechurch. Other persons were present, but it is not necessary to mention them. Raymond was not present. He ought to have handed to Smith, or brought over or sent over, the certificates of the shares which he had promised to give in security. Instead of that, he sent to Mr. Maugham, who was his solicitor in Paris, the two certified transfers to which I have already referred. Mr. Maugham received them by post on the morning of May 30. He explained to Cavanagh and also to Smith, who probably knew quite as much about certified transfers as he did, that certified transfers were recognised on the Stock Exchange, and that by the rules of the Stock Exchange payment was made on the production of a certified transfer. Then the parties adjourned to the office of George Whitechurch, Limited. The certified transfers were not produced on that occasion. But they were mentioned, and Whitechurch said that he knew all about it, and that it was all right, and that he was satisfied. Whitechurch had that morning received a letter from Raymond, stating that he had sent to Maugham certified transfers of preference and ordinary shares which ought to make Cavanagh quite safe, and that he had to get them from his family and intimate friends who held them. There was nothing in the letter calculated to excite suspicion in the mind of Whitechurch, and it seems to me that he was quite justified in saying what he did at the interview on the 30th on the strength of Raymond's letter. Smith says: "I put it to him expressly, if he required the original certificates to be annexed to the certificate"—meaning, I suppose, the transfers—"the appointment for the next day would have to go off. He said, 'I shall be quite satisfied if it is Wells' signature.'"

The interview of the 31st is more important. It took place at the office of a gentleman who was Cavanagh's French counsel, and who read over the deed of arrangement which he had drawn up in the interval. Here the certified transfers were produced, and George Whitechurch looked at them. There is a dispute about what he said and what Smith said. Whitechurch and Smith contradict each other undoubtedly. Of the two, I am disposed to think that Whitechurch was probably more accurate in his recollection, because Smith in his correspondence (which is in evidence) on more than one occasion gives a very inaccurate account of transactions which had only recently occurred, and which ought to have been fresh in his recollection. I do not think the contradiction is at all material, because it seems to me that the respondent's case fails, whether you take the account that Smith gives, or the finding of the jury, or the interpretation which the Court of Appeal placed upon that finding. Smith says: "Mr. Whitechurch looked at the transfers and said, 'Yes, these transfers are in order. The secretary, I see, has certified them. Mr. Cavanagh will sign this; send them back to London, and fresh certificates will then be signed and sent to Mr. Cavanagh.' . . . I said, 'Mr. Whitechurch, if there is any doubt about it, let this appointment go off, and we will have these certificates attached.'" That is Smith's statement. The jury found that George Whitechurch "allowed the plaintiff to think it was all right in order to induce the plaintiff to withdraw the 'opposition.'" It is not very clear what the jury really meant. The Master of the Rolls thinks they meant to say that Whitechurch represented that "the certified transfers were as good as transfers plus certificates." Collins L.J. held that "the jury meant that Whitechurch led Cavanagh to believe that nothing more was required by the company to entitle the plaintiff to receive a certificate giving him the right to be registered as the transferee of the shares."

My Lords, I must confess I am utterly at a loss to see any ground upon which an estoppel can be raised against the company. To begin with, what authority had George Whitechurch to make any representation in regard to these certified

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transfers which could bind the company? He was no doubt the managing director. The commercial business of the company was entrusted to him. But nobody can suppose that this was commercial business. I put that aside. Then I have always understood that a representation to bind anybody as an estoppel must be a representation of an existing fact, or rather a representation as to some fact alleged to be in existence, and must not consist of promises de futuro. What was it that Whitechurch represented as an existing fact? That Wells was the secretary of the company, and that the certification on the transfers was signed by him? Well, that was perfectly true. That Wells had actually received the necessary certificates? It is absurd to suppose that Whitechurch was asked to guarantee that. He had no reason to doubt Wells' honesty, and naturally took it for granted that Wells would not have given a receipt for that which he had not received. The Master of the Rolls seems to think that the representation attributed to Whitechurch was a representation to the effect that the company or the board of directors would act on the certified transfer without requiring anything more. That seems to be the view of Collins L.J. also. That is not a representation of an existing fact. If it is anything it is a promise de futuro, which cannot be an estoppel.

The doctrine of estoppel by representation is a very old head of equity. It has been discussed not unfrequently in this House, notably in the case of *Jorden* v. *Money* (1), to which Lord Selborne was constantly in the habit of referring. It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr* v. *London and North Western Ry. Co.* (2) Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles.

There are two points which seem to me to be material, and which I think the learned judges in the Court of Appeal have

(1) (1854) 5 H. L. C. 185. (2) L. R. 10 C. P. 317.

overlooked. In the first place, it is obvious that the purpose of the interview which Cavanagh and Smith had with George Whitechurch was to find out whether he was satisfied in the then position of affairs to acquiesce in the proposed arrangement, and to sign the proposed deed in testimony of that acquiescence. That was all Whitechurch had to do with the matter. As Mr. Smith told Mr. Whitechurch in a letter dated June 30, only a month after this interview, it was not for him or his board, so far as creditors were concerned, to be informed of dealings and transactions taking place between shareholders in his company and their creditors. That is a pertinent remark if not a self-evident proposition, and there is a touch of humour about it, coming as it does from a man who now declares that in this very matter, with which at the time he thought Whitechurch had no concern, he really and truly took Whitechurch into his confidence, and really and truly relied on his advice and assurances.

In the next place, it is, in my opinion, most important to bear in mind that Cavanagh and his solicitor must be taken to have been cognizant of the articles of association of George Whitechurch, Limited, which deal with the transfer of shares in that company. Cavanagh was, or had been, a shareholder in the company, and Smith only a few days before had asked for a print of the articles which Raymond had promised him, and which I presume he obtained. But whether Cavanagh and Smith were in fact acquainted with the regulations of the company or not, they must be taken to have had notice of them. "Every joint stock company," said Lord Hatherley in this House (*Mahony* v. *East Holyford Mining Co.* (1)), "has its memorandum and articles of association . . . . open to all who are minded to have any dealings whatsoever with the company, and those who deal with them must be affected with notice of all that is contained in those two documents." To my mind it is absurd to suppose that Smith, a solicitor, carrying on business in the City of London, a trained lawyer, as the Master of the Rolls describes him, could have imagined that one director could set at nought the articles of his company,

(1) (1875) L. R. 7 H. L. 869.

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and bind his company by estoppel or otherwise to act in contravention of its regulations. And I have some difficulty in believing that any man of business, whether a trained lawyer or not, could imagine that any board of directors would alter the register of their shareholders on the faith of a certified transfer without the production and cancellation of the old certificate.

As regards the other points which have been discussed, I do not propose to add anything beyond saying that, even if there were an estoppel, the respondent, in my opinion, would have some difficulty in proving damage.

For the reasons I have given, I think that the appeal must be allowed, and the action dismissed with costs both here and below.

Lord Shand has read this judgment and entirely concurs.

LORD JAMES OF HEREFORD. My Lords, I have entertained considerable doubt as to the judgment that should be given in this case; but after consideration I have come to the conclusion that the action cannot be maintained, and that therefore the appeal should be allowed. As it appears to me that my noble and learned friend Lord Macnaghten has very correctly and fully stated the facts of the case in his judgment, I do not repeat them. The action is based upon two alleged grounds of estoppel. As to one I have no doubt.

It may be accepted that on May 30 and 31, 1899, interviews took place in Paris between Mr. Cavanagh, his solicitor, Mr. Smith, Mr. Maugham, and Mr. G. Whitechurch, the managing director of the defendant company. During these interviews Mr. Whitechurch was told by Cavanagh or Smith that certified transfers of certain shares proposed to be transferred to Cavanagh were in the hands of Mr. Maugham, who thought they were in order. On hearing this Mr. Whitechurch observed that if the signature of the secretary was genuine they would be in order. It should be observed that no inquiry from Mr. Whitechurch appears to have been made in the interests or on behalf of Cavanagh. The discussion related to the question whether Mr. Whitechurch would require the original certi-

ficates to be produced; and it was rather in respect of his own interests that Mr. Whitechurch made the remark which is relied upon as an estoppel. I think that in fact there was no representation of a non-existent fact—at most only an opinion was expressed, and certainly there was no intention to deceive the plaintiff or to cause him to rely upon a supposed state of facts which did not exist.

I also think that Mr. Whitechurch, when taking part in this conversation, was not acting as the agent of the company, so as to render it liable for misstatements of fact by him. It is true that he was managing director of the company, and had very extensive powers conferred upon him as such by art. 107 of the articles of association; but these powers refer to the carrying on the commercial business of the company, and would not cover such a transaction as the transfer of shares. Under this head of the case I think no estoppel is established.

But the second alleged estoppel presents a question more difficult of solution than the one above dealt with. On May 29, 1899, Wells, as secretary of the defendant company, gave two "certifications" of transfer, one "coupon for 1100*l.* preference shares in the company's office, George Whitechurch, Limited, Richard G. Wells, Secretary." The second certification was in the same form, and deals with 9250 ordinary shares. Both "certifications" were indorsed on transfers executed by Raymond. "Coupon" is identical in its meaning in the above documents with "certificate."

At the time Wells wrote such certifications he knew they were false statements. Raymond possessed no such shares, and no certificates had been lodged in the office of the company. Wells was acting fraudulently in collusion with Raymond, and in no way for the benefit of the company. In determining the liability of the company it is necessary to determine the extent of Wells' agency. He was secretary of the company, and, as said, it would be his duty to give "certifications" of certificates of shares being deposited in his hands. So far he would be acting within his agency; but if he acknowledges the receipt of certificates which never were in his hands, he is doing that which his principals never intended or authorized him to do,

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and which is, I think, an act outside and beyond his agency, either express or implied. I quite feel the force of the argument that the public who act upon these certifications have to deal with an agent appointed by a company to transact its business, and within his duty to give certifications. It is said, How can persons receiving the certifications test the honesty of the agent or the truth of his statements? I do not think they can, and it must be that a risk is run, for the apparently truthful statements may be false. But, on the other hand, can it be reasonable that an agent who is empowered to acknowledge the receipt of certain documents is to bind his principal by fraudulently and criminally giving acknowledgments of documents never in his hands?

There is on the one hand a risk cast on the members of the public who rely upon the honesty of the agents; but how far greater would be the risk of the principal if he were to be liable for the frauds of the agent, which might be effected to an unlimited extent ruinous to the principal? It appears to me to be impossible to hold the company bound by the act of Wells without overruling the judgment in the case of *Grant* v. *Norway*. (1) In that case the master of a vessel had authority from the shipowner to give bills of lading for goods received on board. The master fraudulently gave bills of lading for goods not received by him. It was held, and the judgment has since been acted on and approved of in your Lordships' House, that the master, not having acted within his agency, the shipowner was not liable on the fictitious bills of lading. By this decision a great risk is thrown upon indorsees of bills of lading, who may find their securities valueless through the fraud of the masters of vessels, and this inconvenience was pressed in the argument of the case, but without avail, and apparently the commercial world has not found such inconvenience to be so great as was suggested in argument.

I have only to add that the judgment now given must not be supposed to extend to certificates which are made evidence of title by the Act of 1862, and which are passed under the seal of the company.

(1) 10 C. B. 665.

I am of opinion that the appeal must prevail, and that the judgments of the Courts below should be reversed with costs.

LORD ROBERTSON (as read by Lord Davey). My Lords, the case of the respondent is one of estoppel, and it is an essential element in such cases (as is clearly expressed in the case of *Carr* v. *London and North Western Ry. Co.* (1), cited by the Master of the Rolls) that the person to whom the representation was made has suffered loss by acting upon it; or, to put it in another way, has altered his position to his detriment by acting on the representation. In my opinion, the respondent has completely failed in this essential matter. This is not, be it observed, merely a question of damages; there is no estoppel, unless the appellants now averring the truth about the shares in question would (to use the words of James L.J. in *Ex parte Adamson* (2)) "work some wrong" to the respondent.

Now this question (which I proceed to discuss) is, on the facts, by no means a complicated one, although it occurs in a very complicated case; and indeed its very simplicity seems to have led to its receiving less attention than its controversial importance demands. The respondent's case, put shortly, is that because the appellants told him that he was getting a good transfer, therefore he gave up the "opposition" and the "saisie." His case is not, and could not possibly be, that because the appellants called the transfer good, whereas it was bad, therefore he lost the shares said to be transferred. The respondent lost the shares, not because of anything the appellants said about them, but because his transferor had them not to transfer.

What the respondent has to make out is that by dealing as he did with the "opposition" and the "saisie" he suffered prejudice. Now, whether he did so or not depends on what good the "opposition" and the "saisie" were doing to him, which he lost by the way in which he was induced to deal with them. In the Courts below, although the point was raised sharply before Bigham J., it has got the go-by; as the case stands, there is, in my opinion, no evidence of prejudice; and,

(1) L. R. 10 C. P. 317. (2) (1878) 8 Ch. D. 817.

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on the contrary, it is perfectly plain that the cessation of the Innox business was all that the "opposition" and the "saisie" were adapted to procure, and that this would have done the respondent harm and no good. Your Lordships doubtless remember (and it is important to do so) that the "opposition" prevented those debtors of Innox who received notice from paying to them, while the "saisie" prevented Innox from disposing of the goods in their hands, an officer being put in possession. But by these precautions no preference was obtained over other creditors; and this is a very material point in the case. Now, when the shares were supposed to have been transferred, what was done was that the "opposition" was withdrawn simpliciter, but the "saisie" was only partially withdrawn, so as to allow the dealing by the appellants with such goods as the respondent sanctioned; and the man in possession remained there to enforce the "saisie" in other respects. The practical result was that, with his grip maintained on the operations of Innox, the respondent allowed them to trade to such an extent as he deemed fit. This being the simple state of the facts, it is not surprising that no one has sworn or said that the respondent, by relaxing the "saisie" and giving up the "opposition," lost money which he would have got if he had retained them.

This matter was so dealt with at the trial that Bigham J. does not distinguish between the "saisie" and the "opposition," or in any way estimate the utility of either or both to the respondent. Yet this was the essence of the respondent's claim. As things stand, I think it has been proved that no loss was caused to the respondent by acting as he did, and that no wrong is now wrought him by the appellants averring the truth as to the shares.

On this ground I am in favour of allowing the appeal; and as in this view the plaintiff's case has really no merits, I am indisposed to enter on the other questions which have been argued.

As to these, I may say in a word that the case of representation by Whitechurch seems to me entirely to break down; but that as regards the representation by the secretary, I have

grave doubts. It seems to me extremely doubtful whether *Grant* v. *Norway* (1) can be held, or has ever been held, to represent the general law, or to do more than determine the law about shipmasters and bills of lading; and whether, assuming it to have the wider bearing, it is reconcilable with the doctrine of Lord Selborne in *Houldsworth* v. *City of Glasgow Bank*. (2) I find it extremely difficult on principle to hold that the scope of an agent's employment can be limited to the right performance of his duties, or to say that an agent within whose province it is truly to record a fact is outside the scope of his duties when he falsely records it, when the question of liability to be decided is whether a loss is to be borne by the principal who placed him there, or by an innocent third party who had no voice in selecting him.

LORD BRAMPTON (after stating the facts above set out). At the trial it was contended for the respondent, upon the authority of the case of *Carr* v. *London and North Western Ry. Co.* (3), cited at length in the judgment of the Court of Appeal, that the appellant company was by the certification of the transfers signed by Wells, the secretary, and by the language and conduct of Mr. Whitechurch, the managing director, estopped from denying that Raymond was the registered holder of and entitled to transfer the shares.

I take it to be common knowledge of all intelligent men of business that there is a wide and well-recognised difference between a certificate of shares under the seal of the company, which, by s. 31 of the Companies Act of 1862, is made primâ facie evidence of the title of the person named in it to the shares therein specified—see *In re Bahia and San Francisco Ry. Co.* (4)—and a transfer certification such as that which appears on the margin of the transfers in question: the latter is not recognised at all by the Companies Acts, nor is it even mentioned in the articles of association, and it is useless as evidence of the title of the transferor to the shares he proposes to transfer. It is in fact merely a voucher under the hand

(1) 10 C. B. 665.
(2) (1880) 5 App. Cas. 326.
(3) L. R. 10 C. P. 317.
(4) (1868) L. R. 3 Q. B. 584.

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of the secretary, in the name of his company, that certificates or other documents shewing, in his judgment, a primâ facie title in the transferor to such shares, have been lodged in the office of the company; the object being to enable the transferor to give to the transferee a reasonable assurance that he has, or will have, the power to make a good title to the shares when the necessity arises for him to do so. This necessity always arises when the company is called upon to register a transfer.

When such a certification bears the genuine signature of the secretary, it is commonly said to be "all right" or "in order," and the making of the contract for transfer proceeds, but always subject to this—that, before the title of the transferee can be completed by placing his name as owner on the register, it is essential that the certificate of the transferor's ownership of the shares to be transferred shall be left at the office of the company with the transfer, in order that it may be cancelled so far as relates to the transferred shares, and the register corrected by substituting the name of the transferee for that of the transferor; for until this is done the transferor is to be deemed to remain the holder of the shares: see articles of association of appellant company, Nos. 12, 27, 28, 29. The case of *Bishop* v. *Balkis Consolidated Co.* (1), if rightly decided, as I am satisfied it was, seems to me to dispose of this part of the case, and to establish beyond all question that a transfer certification amounts to no warranty or representation of title.

Of course, every purchaser of shares is entitled by himself or his solicitor, before the final completion of his bargain, to investigate, if he desires to do so, the title of his transferor, and he is entitled to search for himself the register of shareholders to see the share certificates or other documents relied on, and to peruse the articles of association of the company, just as a purchaser of real property may require his vendor to verify his abstract of title; and if he omits to take any of the means at his command to satisfy himself of his transferor's title, he cannot reasonably complain that the company require

(1) 25 Q. B. D. 512.

proof of it before they alter their register or issue him new certificates. Were it not to do so, most serious frauds would be comparatively easy to commit. An inspection of the register of shares in this case, or a request to see the coupon mentioned in the certification, would have at once disclosed the fact that Raymond had no shares, such as those specified, to transfer.

In the present case the appellant company dispute their liability, so far as it is based upon Wells' conduct, upon several grounds: (1.) Upon the ground that the certifications were not made by him in the ordinary course of his duty to the company. (2.) That he signed the certifications fraudulently and contrary to his duty. (3.) Because, even if it was so made as to constitute it the certificate of the company, it does not amount to such a representation as alleged in the claim. (4.) That if it amounts to such a representation it is ultra vires. (5.) That it was not a representation made to Cavanagh or his solicitor, nor with any intention to induce them to act in any particular way, but was simply made for Raymond to use as he pleased, without knowledge of or inquiry as to the purposes for which he intended to use it.

I entirely agree in the views expressed by Lord Macnaghten as to the limited authority of such a secretary as Wells.

I do not intend to say that it was no part of the duty of Wells on occasions when a certificated transfer was required for shares in the appellant company to exercise an honest discretion to grant it, and to certify to the truth as he knew or believed it to be, and if in framing such a certificate he by mere negligence made an erroneous statement, causing injury to the person to whom it was handed, that he might act upon the faith of it, I do not say that an action might not be sustained against the company, his employers, to recover such damages as might be occasioned by such negligence. But the charge made against Wells was in no sense one of negligence, but one of deliberate fraud, utterly unconnected with the course of his duty as secretary. He simply lent himself to Raymond, in whose service he still was as clerk, and became a mere tool in his hands. Raymond in arranging with Cavanagh to give

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him 10,350 shares "to be represented by certificated transfers" knew that he did not possess one single share of those he intended to include in his transfer, and that he could only even colourably fulfill his agreement and get rid of the "*opposition*" by handing false transfer certificates to Cavanagh. These he could only obtain by the assistance of Wells, who made them knowing that he was uttering deliberate falsehoods, without even a semblance of excuse. Having done so, he allowed Raymond to take them away, not knowing or even inquiring for what purpose they were to be used.

The jury rightly, as I think, found Wells' action to be fraudulent, but they found also that it was committed for the benefit of the company as well as for Raymond. How they could have arrived at such a conclusion passes my understanding; there was not, in my opinion, a scintilla of evidence to support it.

They also found that it was in the ordinary course of Wells' business, as secretary, to give certificates of this character. That may have been so on occasions when he honestly believed the facts certified to be true, and when he was dealing with persons in the ordinary course of a business transaction; but this was no business transaction at all, nor was it intended to be. Wells was not even colourably discharging a duty. The facts I have stated stamp both Wells and Raymond to have been a pair of fraudulent knaves acting without authority and in disregard of duty. In my opinion the appellant company is not responsible for that fraud, and to argue that such certificates so prepared should operate to create estoppels against the company, preventing it from asserting and proving the truth, requires some courage.

I am content to adopt in its integrity the judgment of Willes J. in *Barwick* v. *English Joint Stock Banking Co.* (1) defining the liability of a master for the wrongful acts of his servant: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit" because although the master has not authorized the particular act "he has put the agent in his

(1) L. R. 2 Ex. 259.

place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." This is very forcibly illustrated by *Limpus* v. *General Omnibus Co.* (1), where the driver was actually doing the work he was employed to do, but was doing it in a wrongful manner. The Court of Appeal in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (2) defines, I think, accurately when a master may repudiate the wrongful act of a servant fraudulently committed. Bowen L.J. commences his considered judgment by saying that, "except in the overruled case of *Swift* v. *Winterbotham* (3)," he is "aware of no precedent for holding that a principal is liable in an action of deceit for the unauthorized and fraudulent act of a servant or agent committed, not for the general or special benefit of the principal, but for the servant's own private ends." I think, for the reasons and upon the authorities I have cited, that if this case rested solely upon the transfer certificate, signed in the name of the company by Wells, the misconduct I have discussed would afford the company a complete answer to the action so far as it is based on his actions.

But as I have yet to deal with other matters beyond those arising out of Wells' misconduct, I think it will be convenient now to call your Lordships' attention to the specific claim made against the appellant company as it is set forth in paragraph 6 of the "points of claim," to which I think the respondent should be strictly confined. This claim is thus stated: "In consequence of the $\frac{\text{representations}}{\text{wilful misrepresentations}}$ of the defendant company to the plaintiff, *that the said Anthony Raymond was the registered holder of and entitled to transfer the shares in the defendant company specified in the writ*, the plaintiff accepted from the said Anthony Raymond transfers, certificated by the company, of the said shares to himself . . . . as security for the said debt, and withdrew the '*opposition.*'"

I will assume for the moment that Wells was guilty of no

(1) 1 H. & C. 526. (2) 18 Q. B. D. 714.
(3) (1873) L. R. 8 Q. B. 244.

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such misconduct as is alleged against him, and even that he intended to act for the benefit of the company. This directly raises the question: What is the true construction of the language of the transfer certificate? For Wells said nothing and did nothing except issue it, and unless that amounted to such a representation as is relied on by the pleadings the whole case fails. As to this it seems to me that it is only necessary to refer back to what I have already said as to the meaning and object of such certifications. If I am correct in what I then said, it follows that the certification did not amount to a positive representation or assertion of title in Raymond. Nothing short of that would suffice to support the estoppel claimed. I think, therefore, that upon this ground also the appellant company is entitled to the judgment of this House.

The third ground of defence is that, even if, contrary to the view I have taken, the certification could be held to amount to such a representation, it was made ultra vires; for neither Whitechurch, the manager, nor Wells, the secretary, had even a semblance of authority to issue a document of title equivalent to a share certificate. A certificate of shares is, by s. 31 of the Companies Act, 1862, made primâ facie evidence of the title of the person named to such shares as are comprised within it; but such a certificate can only be made under the seal of the company (articles of association, No. 12), and the seal can only be affixed by order of a resolution of the board, and in the presence of a director and of the secretary, who are both to sign the instrument to which the seal is so affixed in their presence (art. 112). It is impossible to suppose that a managing director or a secretary could by his own signature and the use, by means of the rubber stamp, of the company's name, dispense with the order of the board, and the seal and the requisite attestations, and create an instrument which practically should have the same effect, and should estop the company from disproving a title which did not exist, and which they had no authority to create by giving a new and different interpretation to the language of an instrument than that which it had already acquired amongst men of business accustomed to deal with instruments of that class. Nor can

it be that any secretary has power to give or a manager to sanction a certificate which could have the effect of abrogating art. 27 of the articles of association, requiring the transfer, accompanied by the certificates of shares to be transferred, to be left at the offices of the company.

I may here observe that the great power given to the managing director by art. 107 is conferred only in relation to the commercial business of the company; and I am at a loss to see how the sale and purchase or the transfer and acceptance of shares can be treated as any part of the commercial business of a company established for carrying on the business of leather merchants.

I will now deal with that which Mr. Whitechurch did and said touching the questions at issue.

The sole object of the interviews between Cavanagh and his solicitor Smith and G. Whitechurch, of May 30 and 31, was to procure his signature as managing director of his company to the few words of acquiescence to the agreement, so far as it affected his company. This acquiescence he was willing to give, if satisfied that the arrangement made was bonâ fide and the proceeding was in due order; but his company was under no obligation, and he might have refused to acquiesce, if he had thought fit, without assigning any reason at all.

At the first of these interviews the certified transfers, being in Mr. Maugham's possession, were not shewn to him, but he was told by Cavanagh or Smith that Maugham had two certified transfers of the shares proposed to be handed to Cavanagh, and had expressed an opinion that they were "in order." On this Mr. G. Whitechurch, having no reason to suspect that anything was wrong, with perfect truth and honesty made the remark that they would be "in order" if he was satisfied that the signatures to them were the genuine signatures of the secretary. This seems to have been the opinion of Mr. Smith himself. The special question put to Mr. Whitechurch by Mr. Smith was, whether he required the original certificates to be annexed; and this inquiry was accompanied by what appears to me to be a threat that if he required more the appointment for the next day would have to go off—

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obviously for the purpose of putting pressure upon him by intimating that the responsibility of any postponement would rest upon him.

There was no semblance of inquiry by Cavanagh or Smith of Mr. G. Whitechurch whether Cavanagh might safely, or with prudence, accept the transfers. Indeed, Cavanagh had, in fact, got in such certified transfers all that he had bargained for in the agreement.

The reply of Mr. G. Whitechurch, before he had seen the documents, that he should be quite satisfied if the signature to the certification was Wells' signature, cannot fairly be construed to convey any more than this: that he would not, if satisfied on that point, be an obstacle to the completion on the following day as appointed. The same observations apply to his conduct and words on that day when he, having seen the certificates and recognised the signature of Wells, expressed himself satisfied and signed the acquiescence. His expression of satisfaction that the "opposition" was about to be removed, knowing how much it was desired, and how vitally important it was to the Innox Company and Raymond, was a very natural one. Believing, as he undoubtedly did, that all was in order, and having no reason to suspect a fraud, his conduct and language were just what one would have expected from him.

If, on the other hand, at that time Mr. Smith intended his question to convey, what it certainly did not express, namely, a doubt whether the certified transfers were in that case of equal value with certificates of shares, I can only say I marvel that he should have felt justified in inviting Mr. G. Whitechurch to express an opinion without telling him that Raymond had so recently as the afternoon of May 29 promised to give him the certificates of the 10,350 shares that he might have them ready to produce at the meeting to execute the agreement, and that he had broken his promise, and had neither handed over nor sent a certificate for a single share, knowing, as he admitted he did, the wide difference between share certificates and transfer certifications. If this had been told to Mr. G. Whitechurch he would have had good reason to suspect

something was wrong, and would, no doubt, have suggested further inquiry. But, believing all was right and in order, he had no reason for interfering. The finding of the jury that Whitechurch *allowed* Cavanagh to think it was all right *in order to induce* him to withdraw the "*opposition*" was wholly unwarranted by the evidence, if it meant more than that he did not interfere to prevent him from acting as he was advised by his solicitor because he saw no reason to do so. I do not find in all this evidence anything to support the claim to the estoppel contended for: far from it. To support an estoppel the evidence ought to be clear and unambiguous, as was stated by Lindley L.J., now Lord Lindley, in *Low* v. *Bouverie* (1), in which many previous cases on the subject were carefully reviewed. Bowen L.J. said that "the language upon which an estoppel is founded must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed"; and in deciding the case before him against the then plaintiff he said: "I think his" (the defendant's) "language would be reasonably understood as conveying an intimation of the state of his belief without an assertion that the fact was so apart from the limitation of his own knowledge." To the same effect was the judgment of Kay L.J. To this I would add that in my judgment no representations can be relied on as estoppels if they have been induced by the concealment of any material fact on the part of those who seek to use them as such; and if the person to whom they are made knows something which, if revealed, would have been calculated to influence the other to hesitate or seek for further information before speaking positively, and that something has been withheld, the representation ought not to be treated as an estoppel. Mr. Whitechurch had no reason to doubt, and therefore believed the certificates to be genuine and true when he recognised Wells' signature. Beyond that he knew nothing and suspected nothing. When, therefore, he said they were in order, or appeared in order, he

(1) [1891] 3 Ch. 101.

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ought not to be considered as pledging himself to anything beyond this: that according to ordinary usage and practice the certificate was in due form and order, and that *he* was satisfied and content to acquiesce as he did.

In my opinion it is clear that the failure of Raymond to produce or hand the certificates to Smith ought to have been quite sufficient to put that astute solicitor on his guard, and had he used the most ordinary precaution, either by searching the register or demanding an inspection of the coupon, or insisted upon Raymond shewing him the certificates, the fraud must have been instantly discovered.

I think this appeal ought to be allowed, and that the judgments of the Court of Appeal and of Bigham J. should be reversed, and judgment entered for the appellant company with costs.

Order of the Court of Appeal and judgment of Bigham J. reversed and judgment entered for the appellants: The respondent to pay to the appellants the costs both here and below: Cause remitted to the King's Bench Division.

Lords' Journals, August 5, 1901.

Solicitors: *S. M. & J. B. Benson; C. J. Smith & Hudson.*

[HOUSE OF LORDS.]

ECONOMIC LIFE ASSURANCE SOCIETY . . . . . } APPELLANTS;

AND

USBORNE AND OTHERS . . . . . RESPONDENTS.

H. L. (I.) 1901 Nov. 14.

Covenant—Judgment—Merger—Mortgage—Rate of Interest—Ancillary and Independent Covenants.

A mortgage deed contained a proviso for redemption if the mortgagors should pay the principal with interest after the rate thereinafter covenanted. The mortgagors covenanted to repay the principal on a day named with interest at 5 per cent., and if the principal was not then paid, to pay interest at that rate half-yearly on so much of the principal as should remain unpaid. The mortgagors having made default, the mortgagees recovered judgment against them for principal and interest upon the covenant.

An action having been brought by another mortgagee for an account of all moneys due to incumbrancers:—

Held, that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent. interest, yet upon the true construction of this mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent.

The decisions of the Master of the Rolls and the Court of Appeal in Ireland, *Usborne* v. *Limerick Market Trustees*, [1900] 1 I. R. 85, reversed on this point.

By a statutory mortgage in 1853 the Limerick Market Trustees assigned the undertaking, rents, tolls, &c., to the National Bank of Ireland until the loan of 10,000*l.*, with interest at 4½ per cent., should be satisfied, the principal to be repaid in eighteen months. A similar mortgage was made in 1854 to secure 10,000*l.* with interest at 5 per cent., the principal to be repaid in twelve months. In 1858 these mortgages were transferred by deed to the appellants, who advanced 20,000*l.* By a separate deed of the same date the Limerick Market Trustees assigned the undertaking, rents, tolls, &c., to the appellants, subject to a proviso for redemption if the market trustees should pay the appellants "the sum of 20,000*l.* with interest for the same after the rate at the times and in manner

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hereinafter covenanted." And the trustees covenanted with the appellants to pay the sum of 20,000*l.* on May 17 next with interest at 5 per cent., and if the principal was not then paid to pay interest at that rate half-yearly upon so much of the principal as should remain unpaid after May 17.

In 1897 the appellants brought an action in the Queen's Bench Division in Ireland against the Limerick Market Trustees upon the covenant in the mortgage of 1858 to repay the 20,000*l.* on May 17, 1859, with interest at 5 per cent., and signed judgment for the balance then due.

In 1898 Usborne on behalf of himself and other mortgagees brought an action in the Chancery Division, Ireland, against the Limerick Market Trustees and the appellants, claiming the appointment of a receiver, an account, and payment out of the rents, tolls, &c., to the respective mortgagees according to their priorities. By an order of the Master of the Rolls in this action it was (inter alia) declared that the appellants were entitled to interest at the rate of 4 per cent. from the date of their judgment on the sum of 19,069*l.* This declaration was affirmed by the Court of Appeal (Lord Ashbourne L.C., Fitz-Gibbon and Holmes L.JJ.) as to the rate of interest. (1) Against this decision the appellants brought the present appeal. They also appealed against the decision of the Master of the Rolls and the Court of Appeal upon a question of priorities between the respective mortgagees. That question turned entirely on the construction of the Limerick Market Acts and has no bearing upon the subject of the present report.

Haldane, K.C., and *Jellett, K.C.* (Irish Bar), (*Lyttelton Chubb* with them), for the appellants, contended that though the covenant to pay a debt merged in a judgment the appellants were entitled to retain their security until the principal with interest at 5 per cent. was paid, and discussed the cases referred to in Lord Davey's judgment.

Ronan, K.C., and *Morphy* (both of the Irish Bar), for Usborne and other respondents, contended that, after the judgment upon the covenant, the covenant was merged in the judgment,

(1) [1900] 1 I. R. 85.

and the rate of interest could only be 4 per cent.: see 1 & 2 Vict. c. 110, s. 17.

O'Connor, K.C., and *C. F. Doyle* (both of the Irish Bar), for other respondents.

Haldane, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, this case has occupied a considerable time, but I confess that I have not been able to entertain any doubt as to its true solution.

With respect to the point about the rate of interest, it appears to me that there is a confusion of thought which, with the utmost respect to the very able and learned counsel who have argued this question, has pervaded the whole of the argument. Where you are endeavouring to sue by any form which the law recognises for the realization of the security, or to free it from all claims, whether it be in the form of the redemption of a mortgage, or whatever the form be, all the rights arising from the instrument in question are to be observed; and it is idle to say, because the right as to one specific sum of money has been changed in its nature—changed from a right to sue upon the covenant into a judgment bearing interest at 4 per cent. —that therefore you have got rid of the other obligations which are involved in either the realizing of the security or the freeing of the security, in whichever form it arises, from the claims attaching to it.

My Lords, it seems to me that Fry L.J. in the case of *Ex parte Fewings* (1), which has been so often referred to, has with great precision and accuracy put the whole point: "When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the

(1) (1883) 25 Ch. D. 338, 355.

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principal should remain due either on the covenant or on a judgment." My Lords, if that is accurate, and I believe it to be absolutely accurate and precise, it seems to me that the question is a simple one: it is a question of the construction of this particular deed and the remedy that is now being enforced.

My Lords, it is not necessary to proceed to discuss what follows from what I have said, because it is manifest, on the true construction of this instrument, that there is a right to have the interest at the agreed rate, and the form of procedure which is now brought before your Lordships for review is a form of procedure in which all the claims arising from this instrument are bound to be regarded, and the mere fact of there being a judgment in respect of a particular sum of money does not affect and cannot reasonably be held to affect the rights of the parties under the instrument which we are construing.

For these reasons it appears to me that on this point the appellants are right. The result of that is that in respect of the original proceeding in the Rolls and in the Court of Appeal, under the circumstances which have been detailed to us, the costs ought to come out of the fund, and that in this House, following the ordinary rule of this House, inasmuch as there has been a partial and substantial success and a partial and substantial failure, there will be no costs on either side; and I move your Lordships accordingly.

LORD SHAND concurred.

LORD DAVEY. My Lords, I observe that Holmes L.J., although he says (1) that "the question is a very difficult one," adds, "if it had been asked an Irish lawyer twenty years ago, he would probably have been surprised that it was a question at all. The Incumbered and Landed Estates Courts had at that time sold a large portion of the land in Ireland, and had distributed the greater part of the proceeds amongst incumbrancers. It was not unusual for a mortgagee to obtain a

(1) [1900] 1 I. R. 123.

judgment for his mortgage debt; and yet I believe in settling the schedule of incumbrances he was allowed interest on his unpaid principal at the rate provided by the deed. The practice has never, as far as I am aware, been challenged, at least in a reported case"; and then he proceeds to say that that practice is "inconsistent with the decision in *Arbuthnot* v. *Bunsilall* (1) and with the reasoning of Fry J. in *Popple* v. *Sylvester* (2), and of this Court in *Lowry* v. *Williams*." (3)

My Lords, I entirely sympathise with that expression of opinion of Holmes L.J. It is equally a surprise to me that such a question as has been argued for several hours could possibly be raised in any Court; but I do not agree with the learned Lord Justice that the practice to which he alludes, and which, I believe, is common in England in Chancery chambers as well as in the Incumbered and Landed Estates Courts in Ireland, is inconsistent with any of the cases referred to. I agree with my noble and learned friend on the Woolsack that this question is one of the construction of the deeds only, and the cases which have been referred to have nothing in the world to do with it; but, as those cases have been discussed at great length, perhaps I may be excused if I say a few words upon them.

My Lords, the first case in order of date was *In re Agriculturist Cattle Insurance Co.* (4) In that case a judgment had been recovered, but there was a fresh agreement after the judgment had been recovered to pay the loan with interest, and it was held, and it appears to me quite rightly held, that the mortgagee was entitled to his full interest notwithstanding that the original debt had been merged in the judgment—there was a new debt.

In the case of *In re European Central Ry. Co.* (5), with great deference to Mr. Ronan, it appears to me from the report that it was an application by a debenture-holder to prove as a creditor in the winding-up—not to enforce his security, but to prove as a creditor. A winding-up is not the proper place in

(1) (1890) 62 L. T. (N.S.) 234.
(2) (1882) 22 Ch. D. 98.
(3) [1895] 1 I. R. 274.
(4) (1872) 4 Ch. D. 34, n.
(5) (1876) 4 Ch. D. 33.

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which to enforce your security, and the proof of the creditor is in respect of his personal rights only. It appears, indeed, to have been argued upon the basis of the old fallacy that because something is recoverable in a foreclosure or redemption action, therefore there is a personal right to payment. The proof seems to have been based upon some idea of that kind. That case decides nothing more than what is familiar to all English lawyers, that when a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment.

Then, my Lords, with regard to *Popple* v. *Sylvester* (1), it is not very intelligible from the report what the action was for. Fry L.J. in *Ex parte Fewings* (2) says in an interlocutory observation that it was an action for the purpose of obtaining payment of a debt out of the proceeds of policies which had been mortgaged. Reading that learned judge's own judgment in the case of *Popple* v. *Sylvester* (1), which was decided by him, I came to the conclusion in my own mind that the learned judge's memory was at fault, and that it really was to enforce a demand for personal payment. Mr. Haldane has now obtained a copy of the statement of claim in that action, and it appears that the inference which I had drawn from the terms of the judgment of Fry J. was correct, and that what was asked was only an account of what was due to the plaintiff on the indenture and the payment by the defendant to the plaintiff of what should be found due to the plaintiff on taking such account—that is, it asked only for personal payment. That makes the judgment intelligible, because then the question had to be considered whether the covenant for the payment of the interest was an independent covenant or a covenant which was merely ancillary to the payment of the principal money, and the learned judge, rightly or wrongly (it is perfectly immaterial), came to the conclusion that it was an independent covenant which was not merged in or extinguished by the judgment obtained upon the principal covenant. But why did he come to that conclusion? Because the form of the covenant was to pay interest as long as anything was due

(1) 22 Ch. D. 98. (2) 25 Ch. D. at p. 345.

upon the security. The words of the covenant were, "would so long as the sum of 3000*l.* or any part thereof should remain due on the security pay" such and such interest. He said, because something was due upon the security, ergo, that was an independent subsisting covenant. My Lords, that appears to me to put the law upon a very sound and right footing, but it does not appear to me in any way to affect the decision of the present case.

The case of *Ex parte Fewings* (1) requires no comment. I need not recapitulate at any length the very peculiar circumstances under which it arose. A judgment had been recovered for a mortgage debt; there had been bankruptcy proceedings against the mortgagor followed by a composition, by which it was held, although it was disputed, that the mortgagee was bound. He then tried to prove for his subsequent interest under a covenant, and it was held that the covenant in that case was in a form which was not the same, or bearing the same construction, as that in *Popple* v. *Sylvester* (2), but one which was merely ancillary to the principal covenant, and, therefore, any right of action upon the principal covenant having gone, the right of action upon the ancillary covenant had gone with it. In other words, it was a mere question of the construction of the instrument, and has no bearing whatever upon the present question.

The same observation applies to the case of *Lowry* v. *Williams* (3), although I must take the liberty to say that if Mr. Ronan is right (as I have no doubt he is) in saying that the action was to enforce a security, the argument upon the construction of the covenant was, in my opinion, wholly irrelevant, and it might have been put on a more direct ground.

As regards *Arbuthnot* v. *Bunsilall* (4), decided by Stirling J., there again it was a mere question of the construction of the deed. Of course, you have to look at what the security is, and if you find that the security is merely for what is due on a promissory note or a covenant, or, in other words, is merely to secure the performance of the covenant, then if the covenant

(1) 25 Ch. D. 338.
(2) 22 Ch. D. 98.
(3) [1895] I. R. 274.
(4) 62 L. T. (N.S.) 234.

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is gone the security must go with it. But in the ordinary form of a mortgage to secure a principal sum and interest it is wholly immaterial whether the covenant has gone or not, or whether any right of action subsists upon the covenant or not; and, indeed, it is wholly immaterial, in my judgment, in any action of foreclosure or redemption whether there is any covenant for the payment of subsequent interest or not. Once come to the conclusion that the mortgage is in such a form that the property mortgaged cannot be taken out of the hands of the mortgagee without payment of the principal and full interest, then the covenant has no more to do with it than if it related to another subject-matter altogether.

Now, my Lords, the question here, therefore, is what is the construction of these deeds, and, in my opinion (and I ought to apologize for having detained your Lordships so long), that is the only question in this case.

My Lords, I turn first to the statutory deeds made to the trustees of the National Bank: in what form are they? There were two deeds, and they were in this form—the statutory form; they assigned the rents and tolls to the mortgagees "until the said sum of 10,000*l.*, together with interest for the same at the rate of 4*l.* 10*s.* for every 100*l.* by the year, be satisfied"; that is to say, the mortgagees have a right to go on receiving the rents and tolls until that condition has been satisfied—until they have received 10,000*l.* with interest at the rate of 4*l.* 10*s.* per cent. up to the time of payment. There can be no doubt about the construction of that deed. The other deed is in the same form, the only difference being that the interest is 5 per cent. instead of 4½ per cent. But when the new arrangement was made with the Economic Life Assurance Society in 1858 they, not I think with perfect wisdom, took what they were pleased to call a fresh security; that is to say, they retained the security of the two earlier deeds; but another deed was executed, and the agreement was that the sum secured should be "further secured to them in manner hereinafter mentioned." That deed contains a covenant for the payment of principal and interest on a certain day, and for the payment of subsequent interest if the principal is not paid upon that

day, and there is a proviso for redemption which is in these terms, that if the Limerick Market Trustees should pay to the mortgagees "the sum of 20,000*l.* with interest for the same after the rate at the times and in manner hereinafter covenanted and agreed for the payment thereof," then they shall have back the property.

Now, my Lords, it seems to me to be perfectly immaterial for this purpose whether the rights of the Economic Life Assurance Society depend upon the first deeds or the deed of 1858. If they depend upon the first deeds, they are entitled to whatever those deeds give them. If they depend upon the deed of 1858 it appears to me that they are equally entitled under that proviso for redemption to retain the property until they are paid the full amount of their principal and interest. The reason for that is this—that according to the true construction of the proviso I have read it is not a security to secure the performance of the covenant, but it entitles the mortgagees to sit upon their deeds, as we used to say, or to hold their security until they have been paid every penny of the 20,000*l.*, together with interest measured by what is expressed in the covenant. That is a very different thing from a deed to secure the performance of the covenant. It is not a deed of that character, but a deed which entitles them to retain their security until they are fully paid, the reference to the covenant being merely for brevity's sake to avoid repeating over again what is written out in the course of the covenant.

My Lords, holding the deeds to be of that character, I cannot doubt that the mortgagees are entitled to the benefit of their deeds, and I regret extremely that the case has not been put as it might have been, and, in my opinion, ought to have been, simply upon the construction of the instruments in question.

My Lords, there is only one subsidiary point, and that is whether Mr. Haldane's client is entitled to 5 per cent. interest upon the whole 20,000*l.*, or to 4½ per cent. upon one moiety of it, and 5 per cent. upon the other. In my opinion, although I think he is entitled to the full benefit of the earlier deeds, the effect of the deed of 1858, the further

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security, as it is called, was to increase the interest upon the whole to 5 per cent.; and, in my judgment, so far as I am able to master the contents of that very long, and no doubt very well drawn, deed, that is the only effect of it, and it might have been expressed in a couple of lines. That being so, I think that Mr. Haldane's client is entitled to priority in the distribution of the funds in the hands of the trustees for interest at the rate of 5 per cent. per annum. I agree with my noble and learned friend on the Woolsack as to the disposal of the costs in this case.

LORD BRAMPTON concurred.

Declared, that the appellants were entitled to interest at the rate of 5 *per cent. per annum from November* 17, 1896, *on the capital sum of* 19,069*l.*, *being the amount due to the appellants at that date under their mortgages; Order of the Master of the Rolls varied accordingly; Order of the Court of Appeal discharged; Cause remitted to the Chancery Division in Ireland.*

Lords' Journals, November 14, 1901.

Solicitors: *Young, Jackson, Beard & King; H. P. & J. H. Cobb; Tatham & Lousada; Batten, Proffitt & Scott.*

[HOUSE OF LORDS.]

LEIGH AND OTHERS . . . . . APPELLANTS; H. L. (E.) 1902 Feb. 6.

AND

TAYLOR AND OTHERS . . . . . RESPONDENTS.

Fixtures—Tapestries—Right of Removal—Tenant for Life and Remainderman.

Valuable tapestries were affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels. They could be removed without doing any structural injury. On the death of the tenant for life:—

Held, that the tapestries, put up with that purpose and attached in that manner, did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life, and were removable by her executor.

The decision of the Court of Appeal, *In re De Falbe*, [1901] 1 Ch. 523, affirmed.

MADAME DE FALBE, tenant for life of the Luton Hoo estates, hung in the drawing-room of the mansion-house valuable tapestries belonging to her. Strips of wood were placed over the paper which covered the walls, and were fastened by nails to the walls. Canvas was stretched over the strips of wood and nailed to them, and the tapestries were stretched over the canvas and fastened by tacks to it and the pieces of wood. Mouldings, resting on the surface of the wall and fastened to it, were placed round each piece of tapestry. Madame de Falbe having died, a summons was taken out on behalf of the infant remainderman before Byrne J., who held that the tapestries had become attached to the freehold and passed with it to the remainderman. This decision was reversed by the Court of Appeal (Rigby, Vaughan Williams, and Stirling L.JJ.), who made an order declaring that the tapestries were chattels belonging to the estate of Madame de Falbe. (1) Against this decision an appeal was brought by those representing the remainderman.

(1) [1901] 1 Ch. 523.

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Feb. 4, 6. *Asquith, K.C.*, and *Levett, K.C.* (*Methold* with them), for the appellants, contended that the tapestries had been affixed to the walls in such a way as to be annexed to the freehold: that as between tenant for life and remainderman the intention of the tenant for life could not avail, even if there had been (which there was not) a declaration of intention during the life of the tenant for life. In addition to the cases discussed in the Court of Appeal they cited *Monti* v. *Barnes*. (1)

Norton, K.C., and *T. L. Wilkinson*, for residuary legatees, respondents, and

H. B. Howard, for the executor, respondent, were not heard.

EARL OF HALSBURY L.C. My Lords, in this case we have had a long and learned argument by the two learned counsel who have appeared for the appellants. I am not certain that I quite understand the conflict between the two propositions, or that I quite understand on what principle one is supposed to decide these cases apart from the facts of each particular case.

One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor.

My Lords, we have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles still in force. But the moment one comes to deal with the

(1) [1901] 1 K. B. 205.

facts of each particular case, I quite agree that something has changed very much: I suspect it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case; and I am content here to apply myself to the facts of this case. Here are tapestries which, it is admitted, are worth a great deal of money. I put the case: Suppose this had been a tenant from year to year, and she put up these things, is it conceivable that a person would for the purpose of a tenancy from year to year put up these things exactly in this way if thereby they made a present of 7000*l.* to the landlord? That, I observe, startled Mr. Levett; he would not acquiesce in that; but in logic I am unable to sever the two sets of facts which I suggest. It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and a tenant on the other; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things. In this case Madame de Falbe stood as tenant for life to the remainderman.

My Lords, we come then, in my view, to the determination of the question upon the principles I have pointed out, applying them to the particular facts of this case. What are they? Here we have objects of ornamentation of very great value. Undoubtedly their only function in life, if it may be so called, is the decoration of a room. Suppose the person had intended to remove them the next month or the next year or what not, I do not know, notwithstanding the ingenious effort that has

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been made by Mr. Levett, in what other way they could have been fastened than they were. We have seen the hard match-board to which they were fastened in the first instance; then canvas was stretched on it, and the decoration of the wall as it originally stood was perfectly preserved except to the extent to which the nails were driven into the wall; they were necessarily driven into the wall, because otherwise the tapestry could not have been stretched out firm, as it was. I do not know any other mode by which the large one, for example, fourteen feet long, could have been placed there as it was. One has immediately before one's mind's eye cases of pictures of another sort, and after all, although this tapestry is very valuable, as I understand, and very beautiful, it is only a picture made in a particular form—it is a picture, whether woven or worked or what not, made for the purpose of ornamentation. When one looks at it and sees what it is, I should have thought, if ever there was an extreme case in which it would have been impossible to suppose that the person intended to dedicate it to the house, it was the case of these tapestries, which can be, and in fact have been, removed without anything but the most trifling disturbance of the material of the wall.

Under those circumstances I can entertain no doubt, now that we have had the whole case before us, that there is nothing which points to any intention to dedicate these tapestries to the house. There is nothing in the nature of the attachment which is necessarily permanent. My Lords, a number of words have been used, such as "only very slightly attached" and "not permanently attached." They really often assume the very question in debate. Looking at the piece of boarding on which the canvas was stretched and on which this tapestry went, I can hardly imagine how a piece of tapestry of that extent, fourteen feet long, stretched against a wall, could be more slightly attached than this was. Under those circumstances it appears to me that the thing is so easily susceptible of being removed, and has in fact been removed, without any damage or material injury to the structure of the wall, that to my mind, so far as it is dependent upon a question

of fact, it never was intended to form part of the structure of this house; and that, after all, is what the meaning of "the benefit of the inheritance" comes to, though expressed in different words. It never was intended to remain a part of the house; the contrary is evident from the very nature of the attachment, the extent and degree of which was as slight as the nature of the thing attached would admit of. Therefore, I come to the conclusion that this thing, put up for ornamentation and for the enjoyment of the person while occupying the house, is not under such circumstances as these part of the house. That is the problem one has to solve in each of these cases. If it is not part of the house, it falls under the rule now laid down for some centuries, that it is a sort of ornamental fixture, and can be removed by whoever has the right to the chattel—whose it was when it was originally put up.

My Lords, for these reasons I am of opinion that this appeal must be dismissed with costs.

I only wish to say that I do not want to add to the confusion which is suggested to have been caused by differences of opinion among the learned judges below. My own view is that, going back for some centuries, the real differences of opinion, which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir. I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house; and I am, therefore, of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

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LORD MACNAGHTEN. My Lords, I am quite of the same opinion.

It seems to me that the only question is, have these tapestries become part of the freehold? I think they were purely matter of ornament, and not part of the freehold at all. Mr. Levett has spoken of the Courts changing the law. I do not think the law has changed. The change I should say is rather in our habits and mode of life. The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times. I think the judgments in the Court of Appeal covered the whole ground.

LORD SHAND. My Lords, I am also of opinion that the decision by the Court of Appeal ought to be affirmed.

It may be true, as has been observed by my noble and learned friend on the Woolsack and by my noble and learned friend opposite (Lord Macnaghten), that there has been no change of the law; but I rather think that in the progress of time the law has been developed in the direction of holding what would at one time have been held to be parts of a building to be now temporary fixtures only, removable by the person who attached them to the building or his personal representative, and I think that this later view should be maintained.

It appears to me to be a sound principle, and to be the result of the later cases (whatever may have been the older law), that where a tenant for a time or a tenant for life has purchased tapestries or pictures and affixed them to the walls for the purposes of ornamentation, he is entitled to remove them, and his executor has the same right. That principle, as it seems to me, is decisive of this case.

[HOUSE OF LORDS.]

LONDON COUNTY COUNCIL . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL AND OTHERS . . . . . } RESPONDENTS.

H. L. (E.) 1902 Feb. 7.

Corporation—County Council—Municipal Corporation—Tramway Business—Omnibus Business—Ancillary Business—Incidental Powers—Ultra Vires—Attorney-General, Jurisdiction of—Local Government Act, 1888, *c.* 41, *ss.* 1, 2, 68, 79—*London County Tramways Act*, 1896, *c. li.*, *ss.* 2, 10.

A county council, being incorporated under s. 79 of the Local Government Act, 1888, is a purely statutory body and has not under s. 2 of that Act the position and powers of a municipal or common law corporation. The statutory powers of the London County Council to purchase and work tramways do not empower it to work omnibuses in connection with the tramways, the omnibus business not being incidental to the tramway business.

The council was restrained by injunction from so acting ultra vires in an action brought by the Attorney-General on the relation of rival omnibus proprietors.

The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute.

The decision of the Court of Appeal, [1901] 1 Ch. 781, affirmed.

THE London Tramways Company by its memorandum of association (as altered in 1891 by an order of the Chancery Division) had power to carry on the business of omnibus proprietors in connection with any business of the company. Under this power the company ran omnibuses from their tramway terminus in Blackfriars Road to Farringdon Road; and from their tramway terminus in Waterloo Road to the Strand, and from their tramway terminus in Westminster Bridge Road to Trafalgar Square, at halfpenny fares. Under statutory powers the London County Council bought from the London Tramways Company their tramways, undertaking, plant, property, &c., and worked the tramways and ran the omnibuses as mentioned above. In 1899, soon after the purchase, the London County Council, as a convenience to the public and for the advantage of the tramways, made two

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of the omnibus services into one by running omnibuses from the tramway terminus in the Westminster Bridge Road across Westminster Bridge along Whitehall and the Strand and across Waterloo Bridge to their tramway terminus in the Waterloo Road and back again.

In August, 1899, the Attorney-General on the relation of certain persons and companies carrying on the business of omnibus proprietors, being ratepayers in London, brought an action against the London County Council in which Cozens-Hardy J. made an order declaring that it was beyond the powers of the council to run omnibuses by the above or any routes in London or to use the county fund or any fund belonging to the ratepayers of London for that purpose. The Court of Appeal (Rigby, Vaughan Williams and Stirling L.JJ.) affirmed that order and added an injunction restraining the London County Council from so acting. (1) Against this decision the council brought the present appeal. The sections of the statutes bearing on the appeal are fully set out in the report below. (1)

Feb. 6, 7. *Haldane, K.C.*, and *Vernon Smith, K.C.* (*Methold* with them), for the appellants. The appellants were empowered by the London Tramways Company (Limited) Act, 1896, s. 31, to buy the tramways and any "works and property connected therewith," that is, the omnibuses and horses, &c.; and impliedly by the London County Tramways Act, 1896, s. 2, to work the omnibus traffic. It is reasonable and naturally incident to the tramways business that they should carry on the omnibus traffic as ancillary to the tramways. Independently of these special statutes the powers and position of the appellants resemble those of a municipal corporation—they are "in the like position in all respects as the council of a borough divided into wards": see the Local Government Act, 1888, s. 2, sub-s. 1, and s. 10, sub-s. 1, of the Municipal Corporations Act, 1882. Having therefore the powers of a municipal and a common law corporation they can use their own property like anybody else and are not confined strictly to the powers

(1) [1901] 1 Ch. 781.

conferred by the special statutes. The county council do not act ultra vires as long as they do not transgress their statutory powers.

Asquith, K.C., Hon. E. C. Macnaghten, K.C., and *Blaiklock*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, it appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of the *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) and the *Attorney-General* v. *Great Eastern Ry. Co.* (2), and I do not think that much would be gained by going through each individual topic of it, because I think now it cannot be doubted that those two cases do constitute the law upon this subject. It is impossible to go behind those two cases: they are now part of the law of this country, and we must acquiesce in them, whether we like them or not.

My Lords, so far as the particular questions before us here are concerned, depending as they do upon the statute itself, with the utmost respect for the learned counsel, I think the contentions hardly admit of plausible statement. The power which is expressly given to the London County Council excludes from them, and to my mind is intended to exclude from them, that which did exist as a separate business under the earlier statute, and which was not intended, and obviously was not intended, to be conferred upon the London County Council. It appears to me to be, as I say, hardly susceptible of plausible statement to suggest that those words can possibly include this separate business. The only argument which, as it appears to me, is capable of plausible statement in the matter is the argument derived from the somewhat clumsy phrase used in the statute with reference to their being in the same position as the council of a borough divided into wards. (3) At first sight that looks as if they were intended to be identified in all particulars; but when one looks at the context of that

(1) (1875) L. R. 7 H. L. 653. (2) (1880) 5 App. Cas. 473.
(3) Local Government Act, 1888, s. 2, sub-s. 1.

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section and sees what it refers to, I think it is manifest, to use Vaughan Williams L.J.'s expression, that it is a section for the machinery governing and arranging the powers and the order of their exercise inside the corporation, when you have got the corporation, but not in the smallest degree intended to enlarge the original objects of it, or to give them any powers other than those previously conferred upon them by statute. That, my Lords, seems to me to dispose of that point, which was, to my mind, the only thing that caused me to consider whether this question was capable of plausible argument or not.

My Lords, one question has been raised, though I think not raised here—it appears to have emerged in the Court below—which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not. Considering the profound respect with which I regard all the observations made by the late Lord Justice James, I cannot help thinking that he did not himself suppose that he was laying down any absolute rule of law. (1) I think he was only giving, in response to the Attorney-General himself, some sort of pious opinion as to the mode in which the discretion of the Attorney-General, and the Attorney-General alone, should be exercised in a case in which he thought it his duty to intervene. In a case where as a part of his public duty

(1) 11 Ch. D. 472, 482.

he has a right to intervene, that which the Courts can decide is whether there is the excess of power which he, the Attorney-General, alleges. Those are the functions of the Court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first law officer of the Crown.

My Lords, I do not think it necessary to go through this case, because the very elaborate and careful judgments delivered both by Cozens-Hardy J. and by the three learned Lords Justices in the Court of Appeal appear to me to exhaust the whole question; and, as I have said before, I think in a great measure the whole question has been already determined by the two cases which have been referred to. Under those circumstances I invite your Lordships to say that this appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. It seems to me to be a very clear case. The London County Council are carrying on two businesses—the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other. The business of an omnibus proprietor is no more incidental to the business of a tramway company than the business of steamship owners is incidental to the undertaking of a railway company which has its terminus at a seaport. I regret most sincerely that the rates and the money of the public should have been spent in defending to the last a case as plain as this.

As regards the argument that the county council have all

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the powers of a common law corporation, that I think is disposed of at once if you turn to the Act of Parliament. The sentence on which the learned counsel for the appellants rely is contained in the first chapter of the Act which deals with the constitution of the council. A separate chapter with a separate heading defines the powers of the county council. In that chapter I can find nothing to warrant the contention of the appellants.

My Lords, with regard to the position and duties of the Attorney-General, I entirely concur with what has fallen from my noble and learned friend on the Woolsack. I am of opinion that the appeal should be dismissed with costs.

LORD SHAND. My Lords, I am of the same opinion.

LORD BRAMPTON. My Lords, after hearing the judgments of Cozens-Hardy J. and of the Lords Justices in the Court of Appeal, I can entertain no doubt at all that this appeal cannot be maintained. I therefore concur in the motion that the appeal be dismissed.

LORDS ROBERTSON and LINDLEY concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 7, 1902.

Solicitors: *W. A. Blaxland; Hicks, Davis & Hunt.*

[HOUSE OF LORDS.]

MIDLAND RAILWAY COMPANY . . . APPELLANTS; H. L. (E.) 1902 Feb. 25.

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Revenue—Stamp Duty—Railway Company—Increase of Nominal Capital—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

By the special Act of a railway company the existing preference stock of the company was cancelled and a new preference stock was created, to a larger amount and bearing a smaller dividend, the new stock being allotted so that each holder of the old stock received an amount of the new which gave him an equivalent dividend. The existing ordinary stock was cancelled and a new ordinary stock was created of twice the amount of the old, one half being preferred ordinary the other half deferred ordinary stock, each holder of the old stock receiving as much of each kind of the new as he held of the old ordinary stock :—

Held, that in each case the increase so authorized by the Act was "an increase of the amount of the nominal share capital" of the company within the meaning of s. 113 of the Stamp Act, 1891, and that the stamp duty imposed by that section was payable in respect of it.

The decision of the Court of Appeal, [1901] 1 K. B. 220, affirmed.

UNDER the powers of the Midland Railway Act, 1897, the shares and stocks in the capital of the appellant company were rearranged and consolidated as follows. Under s. 60 the existing 4 per cent. preference stock (29,000,000*l.*) was cancelled and in lieu thereof 46,000,000*l.* preference stock at 2½ per cent. was created, each holder of the existing stock receiving, in substitution for every 100*l.* of that stock, 160*l.* of the new stock, and so in proportion for every fraction of 100*l.* Under s. 59 similar operations were effected in guaranteed and rent-charge stocks.

Under ss. 61, 62, 63 all the existing ordinary stock (35,000,000*l.*) was cancelled, and 70,000,000*l.* ordinary stock was created in lieu thereof, one half being termed "preferred converted ordinary stock," the other half "deferred converted ordinary stock"; each holder of the existing stock receiving in substitution for every 100*l.* of that stock, 100*l.* of the preferred and 100*l.* of the deferred converted ordinary stock, and so in

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proportion for every fraction of 100*l.* The sections of the Midland Railway Act, 1897, bearing upon these operations are fully stated in the reports below. (1)

The Commissioners of Inland Revenue claimed that under the Stamp Act, 1891, s. 113, these were cases of "increase of the amount of nominal share capital of" the company "authorized by" the company's Act, and that "a statement of the amount of such increase" ought to have been delivered by the company to the Commissioners. The Attorney-General having filed an information against the company, the questions were in substance whether the claim made by the Commissioners was valid, and whether duty was payable under the Stamp Act. The Queen's Bench Division (Ridley and Darling JJ.) decided in favour of the Commissioners (2), and this decision was affirmed by the Court of Appeal (A. L. Smith M.R., Collins and Stirling L.JJ.) (3)

Sir R. T. Reid, K.C., and *Asquith, K.C.* (*Loehnis* with them), for the appellants, contended that there had not been "any increase of the amount of nominal share capital" within the meaning of the Stamp Act, the operations being only a rearrangement and consolidation of the stocks for the purposes of the distribution of dividends, no real increase of the nominal capital by raising fresh capital being authorized; that the Stamp Act contemplated only a real increase of the amount of nominal capital, e.g., where an Act authorizes additional capital to be raised by creating new stock, the company's resources being thereby increased; that here the company's resources were not increased.

[They also referred to the Customs and Inland Revenue Act, 1888, s. 11, and the Customs and Inland Revenue Act, 1889, ss. 16, 17.]

Sir E. H. Carson, S.-G., Danckwerts, K.C., and *Rowlatt*, for the respondents, were not heard.

LORD MACNAGHTEN. My Lords, the only question in this case is whether there was an "increase of the amount of

(1) [1900] 2 Q. B. 353; [1901] 1 K. B. 220.
(2) [1900] 2 Q. B. 353.
(3) [1901] 1 K. B. 220.

nominal share capital" of the Midland Railway Company authorized by the Midland Railway Act, 1897.

It seems that the company were desirous of effecting what is called in their Act a "rearrangement and consolidation of the several classes and denominations of their shares and stocks," and this purpose was carried into effect in and by the Act itself. It may be convenient to give two instances of what was done. The company had a perpetual preference stock carrying a dividend of 4 per cent. They were desirous of reducing that dividend to a uniform rate of 2½ per cent. That was carried out by the Act in this way: It was declared that "the existing and authorized 4 per centum perpetual preference stock of the company" should "be by virtue of this Act cancelled and extinguished," and that there should be "created in lieu thereof 2½ per centum perpetual preference stock of the company to an amount exceeding by 60 per centum the nominal amount of the stock so cancelled and extinguished." Was not that an increase of the amount of the nominal share capital? Then there was a large amount of consolidated ordinary stock, and the company were minded to give their shareholders such advantages as would result from splitting their stock; but instead of splitting it in the proper sense of the word, and giving to every holder of 100*l.* stock 50*l.* of preferred ordinary stock and 50*l.* of deferred ordinary stock, they duplicated their stock and gave each holder of 100*l.* stock 100*l.* preferred and 100*l.* deferred. Again, was not that increasing the amount of the nominal share capital? It seems to me, my Lords, that this company has done the very thing which must bring them within the words of the Stamp Act, and within the grasp of the Commissioners of Inland Revenue.

I cannot see any loophole of escape. It seems to me that if you were asked to describe what has been done with regard to the ordinary consolidated stock of the company, you would say that the actual capital, the working capital, has not been increased by one penny, but the amount of the nominal share capital has been just doubled.

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My Lords, I therefore move your Lordships that this appeal be dismissed with costs.

LORD SHAND. My Lords, I am entirely of the same opinion, and I will only add a very few words to what has been said because of the general importance of the question, for I understand that there are a number of cases which will be regulated by the decision.

My Lords, I cannot express my view of the case better than it is expressed in the judgment of Ridley J. in which he says that the "nominal share capital" means the capital in shares and the figure value attached to it, and that if the company extends the capital and gives it a greater nominal value, that is an increase which requires an additional statement of the amount of such increase to be delivered by the company. Of course that statement being given to the Commissioners of Inland Revenue infers an increase in the stamp duty which has to be paid.

It seems to me, my Lords, that that is clearly the effect of s. 61 and s. 66 of this company's private Act. An increase is created in the amount of the nominal share capital, and indeed it is so called in the Act itself. By s. 61 the previous nominal capital is abolished, and twice the amount is created under that same section. And in s. 66 those who are obtaining this Act of Parliament, very correctly I think, characterise it in this way: "Any increase in the nominal amount of the preference or ordinary capital of the company by virtue of this Act shall not increase" their borrowing powers which are there mentioned.

My Lords, the case seems to me clearly to fall within the 113th section of the Stamp Act, as all the learned judges who have applied their minds to this question think it does. Therefore I am of opinion with your Lordships that the appeal must be dismissed.

LORD DAVEY. My Lords, I am of the same opinion, and I can really add nothing to what has been already said. The

section of the Act appears to me to be free from any possible ambiguity, and I cannot bring my mind to entertain any doubt as to the right construction of it; indeed, but for the very learned and able arguments we have heard from Sir Robert Reid and Mr. Asquith, I should have said that the case was unarguable.

LORD BRAMPTON. My Lords, I concur.

LORD ROBERTSON. My Lords, I am of the same opinion. The appellants' success depends on their contention that an "increase of the amount of nominal share capital" in the sense of the Act of 1891 only takes place when there is an increase in the resources of the company. It seems to me that this test is purposely disregarded by the Legislature in favour of a standard entirely different and more arbitrary. The standard selected is the amount of nominal share capital; and in the present case that is now, as the result of operations authorized by statute, let us say 70,000,000*l*. It is perfectly plain that if this had been the original amount this would be the taxable sum. Now, the enactment about change does not let in any new criterion of amount, but adheres to the same criterion as is set up for a new company by the same section. The question, therefore, comes, as Stirling L.J. says, to be merely one of arithmetic.

LORD LINDLEY. My Lords, I am of the same opinion, and I will express my view by asking and trying to answer two questions. First of all, what is now the amount of the nominal share capital of the company, taking the ordinary stock? The only answer to that question is, 70,000,000*l*. The next question is, what was it before the Act of Parliament was passed? The only answer to that question is, 35,000,000*l*. Can you say there has been no increase? Mr. Asquith has urged, supposing there was an increase, the increase was not authorized because it was not done by the company under the powers of the Act, but was done by the Act itself. That is too subtle for me. If the Act had been imposed by vis major I

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could have seen some force in the argument; but as the company applied for and obtained the increase themselves I cannot see more than a verbal distinction.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 25, 1902.

Solicitors: *Beale & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 *July* 8.

CARR . . . . . APPELLANT;

AND

FRACIS TIMES & CO. . . . . RESPONDENTS.

Action—Lex Loci—Lex Fori—Right of Action in England for Acts in Foreign Country—Territorial Waters.

To found an action in this country for a wrong committed abroad the wrong must be such that it would have been actionable if committed in this country, and the act must not have been justifiable by the law of the place where it was committed.

British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British Navy under the authority of a proclamation issued by the Sultan, the sovereign ruler, of Muscat:—

Held, that the seizure having been shewn to be lawful by the law of Muscat no action could be maintained in this country by the owner of the goods against the naval officer.

IN 1898 the appellant, an officer of the British Navy in command of H.M.S. *Lapwing*, acting under the orders of the British Government, seized in the territorial waters of Muscat ammunition belonging to the respondents which had been shipped by them in London on board the *Baluchistan*. The respondents having brought an action against the appellant for the conversion of the goods, the defence was that the seizure was lawful by the law of Muscat, having been authorized by a proclamation issued by the Sultan, the sovereign ruler, of

Muscat, and pronounced to be lawful by a Court of inquiry in Muscat whose decision was confirmed by the Sultan. Evidence of this was given at the trial. The effect of the proclamation and inquiry is stated in Lord Lindley's judgment. Grantham J., who tried the case with a jury, entered judgment for the defendant. The Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.) reversed this decision and entered judgment for the plaintiff for the value of the ammunition.

July 4, 5, 8. *Sir R. Finlay, A.-G.*, and *Sir E. Carson, S.-G.* (*R. B. D. Acland* with them), for the appellant. An action cannot be maintained in England for a tort committed abroad unless the tort is actionable both by the law of England and the country where it was committed: *Phillips* v. *Eyre* (1) and the cases there cited. This principle is well established and will hardly be contested now. Therefore the only question is one of evidence as to the law of Muscat. The proclamation was an act of State by the Sultan, the absolute despotic ruler of Muscat. The proclamation and the finding of the Court of inquiry were themselves evidence that the seizure was lawful, and there was no evidence the other way.

Sir R. T. Reid, K.C., and *Joseph Walton, K.C.* (*Hollams* with them), for the respondents. The principle established by *Phillips* v. *Eyre* (1) is no doubt sound, but the seizure was not shewn to be lawful by the law of Muscat. The proclamation and the finding of the so-called Court had not the effect contended for. They did not amount to a judgment in rem or inter partes or a judgment at all. The finding of the Court was that the ammunition was intended for Persian ports. This was inconsistent with the finding of the jury that it was intended for Muscat only, in which case the seizure was not authorized by the proclamation. The so-called Court of inquiry was not a judicial Court at all: the plaintiffs were not present or represented and had no notice of the proceedings. The Sultan had no authority to interfere with any rights of two British subjects inter se. A jurisdiction of this character is not recognised by civilized nations. The right over territorial

(1) (1870) L. R. 6 Q. B. 1.

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waters is not the same as the right over land. The right over water is limited and subject to the unfettered right of the peaceful transit of foreign vessels. There is no power to stop the peaceful transit of foreigners for an innocent purpose: see *Reg.* v. *Keyn.* (1) The case, therefore, does not come within the principle relied on for the appellant.

EARL OF HALSBURY L.C. My Lords, this is an action in which the plaintiffs complain of a tort committed on their property in the territorial waters of the Sultan of Muscat. For the first part of what I have to say to your Lordships I shall assume that the words "territorial waters" imply complete jurisdiction. I shall have a word hereafter to say to fortify that proposition, but what I have now to say assumes that proposition which has just been contested.

My Lords, the argument on behalf of the respondents comes to this—that the Sultan of Muscat is not entitled within his own territory to say what shall and what shall not be the subject of traffic. He has said he prohibits (and he has enforced his prohibition by authorizing armed intervention to prevent it) a particular class of traffic passing through his territory; and I confess I am a little surprised that this matter should be contested, or that doubt should be suggested, upon some grounds which I am afraid I have not yet quite appreciated, with reference to some supposed analogy between the justification for this and what is called a judgment in rem. I agree that it is not a judgment in rem, and has nothing to do with a judgment in rem. A judgment in rem has no relation to the absolute and unqualified sovereignty of the particular sovereign who has authorized a particular matter within his own territories. If that is justified it is justified, not because it is a judgment in rem, but because the law of that place, as declared by the sovereign power, prohibits the thing to be done. Sir Robert Reid, with the candour which I expect of him, and which I always find with him, when I put to him the case of a black before the Emancipation Act bringing an action in this country because his liberty had been restrained in Jamaica,

(1) (1876) 2 Ex. D. at pp. 70, 81, 86, 90, 121, 143, 151, 152, 191.

admitted at once that no such action would lie. Why? Because the thing done, though contrary to our English law, was, according to the law of Jamaica at that time, a lawful act, and therefore no complaint in respect of the supposed tort committed in Jamaica could have been made a subject of action in this country. And what is the difference here? Here the Sultan has pronounced what his law is; and I may say at once that, looking at these two documents, upon the true construction of which, as it appears to me, the whole question turns, the Sultan himself has pronounced, by an authoritative declaration, that what was done was lawful.

It is said, forsooth, that an English jury can go behind that declaration of the Sultan and say, "Well, but you ought not to have done so, because in fact these arms were not going where you supposed they were." What has that to do with it? Are we going to administer the law of Muscat and determine whether or not the Sultan was right in what he did? The Sultan's authority there is supreme, and what he says is law is law for the purpose of governing all acts which take place within his territory. My Lords, it appears to me that to attempt to argue this question upon some supposed analogy to the qualifications which prevent the application of the doctrine about a judgment in rem is only calculated to mislead. The broad and simple proposition is that the Sultan has authority to declare that the thing done was lawful, and the thing done was an act of State. It is not an act as between person and person; it is an act of State which the Sultan says authoritatively is lawful; and I cannot doubt that, under such circumstances, the act done is an act which is done with complete authority and cannot be made the subject of an action here.

No doubt a question was raised whether or not, although it was an act done with the Sultan's authority in his own dominions, it was an act which an English subject could so participate in as to protect him if the act, if it had been done elsewhere, in England for instance, would have been unlawful. That question appears to me to have been conclusively decided in the case of *Dobree* v. *Napier*. (1) There it was an act of

(1) (1836) 2 Bing. N. C. 781.

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State done by command of the Portuguese Crown and done by an English subject. It was an a fortiori case; the act done by the English subject was an act which he was by English law prohibited from doing; to the plea that it was done by the authority of the Portuguese Crown, there was a replication that he was forbidden by the Foreign Enlistment Act to take that part in the proceedings which he was proved to have taken; nevertheless, the judgment of the Court held that that was a perfectly lawful proceeding, that it was an act of State, that it was authorized by the Portuguese Crown, and no action would lie in this country against an English subject who participated in it. Here the defendant's act was authorized by the British Crown.

Upon this part of the case, my Lords, it seems to me a very short point, and indeed one which does not require great exposition, because, as I say, the law of the Sultan of Muscat is his will: "Stet pro lege voluntas." He has authorized it and declared authoritatively that it was a perfectly lawful act according to the law of Muscat, and I am of opinion that no English tribunal is capable of going behind that declaration and saying that the Sultan of Muscat was wrong in his exposition of his own law.

My Lords, of course it does not have less authority, although I do not say that it has any more, because the Sultan of Muscat was advised by some persons who appeared to have assumed the ordinary style and language of a Court of justice, who gave a finding which, I think, has created this misapprehension, and which has led to this long disquisition about a judgment in rem. But it rests, and must rest, upon the authority of the sovereign of Muscat; and it appears to me that any other decision would be open to very serious questions of policy if, in every case where the lord of a country has declared what the law of his own country is, it were open to an English tribunal to enter into the question and to determine, as against him, what was the law of his country. At all events, I am of opinion that no such question is open to us, and that we are concluded by the determination of these documents that that is the decision of the Sultan of Muscat deciding on an act of

State, and that therefore it is not open to any tribunal to inquire further into the matter.

There has been an effort made in this House to raise another question, and I am certainly a little surprised that the question should now be raised. I do not gather from any of the judgments that, either before Grantham J. or before the Court of Appeal, that question was raised; at all events, it is not noticed in any of the judgments so far as I can see. That question I must deal with now.

In what I have hitherto said I have dealt with this question as being within the territories of the Sultan of Muscat, and I am of opinion that this was within the territories of the Sultan of Muscat. For whatever purpose *Reg.* v. *Keyn* (1) was quoted, this, I think, is manifest: speaking of it as an authoritative judgment, I cannot forbear from saying that, somewhat unusually, the Legislature of this country in the very next session but one passed an Act of Parliament (2) reversing that judgment—that is to say, affirming in the strongest terms that the decision which had been arrived at by the majority (a very narrow majority) in that case was one that was not the law of England; because the Act does not purport simply to alter the law, but it declares the law and says, in very plain terms, that that is and always has been the law of this country.

My Lords, while I say that, it is only right to add that a great deal of the argument in that case, indeed I think I may say the judgment of Cockburn C.J., who gave the leading judgment on that side of the case, rested upon this; he says: The question is not whether or not this tract of land covered by water is one over which this country could legislate, but the question is whether it has legislated over it; and then he proceeds to point out that this country had not legislated in such a way as to give to the ordinary Courts of law the jurisdiction which was insisted upon in that case.

What relation has such a question as that to the Sultan of Muscat? Does any one suppose that we are entitled to split up the jurisdiction of the Sultan of Muscat into each of its component parts, and to talk about the question of the Common

(1) 2 Ex. D. 63, 208. (2) 41 & 42 Vict. c. 73.

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Law and the Maritime Law and the Admiralty Law as distinguished from the law of Muscat generally? It is idle to ask such a question. Therefore the whole jurisdiction of the Sultan of Muscat is to be treated as one. The Sultan of Muscat has said, "This is an act of State done on my behalf and done by my order and permission, and I hold it to be perfectly lawful."

It appears to me that under those circumstances, for the reasons I have given, the answer is a very ready one, that this is a question which has been finally and conclusively decided by the Sultan of Muscat himself, and I am of opinion that no English Court has a right to interfere with that jurisdiction.

My Lords, for these reasons I move your Lordships that this appeal be allowed, and the judgment of Grantham J. be restored.

LORD MACNAGHTEN. My Lords, I am of the same opinion. This case has been very fully and very ably argued, but after all it comes to an extremely short point.

The respondents, who are, or were, merchants carrying on business in London, Bushire, and Muscat, sue the appellant, a captain in the British Navy, for an alleged wrong committed abroad. He seized their goods, as they allege, illegally, and they claim compensation in damages.

Now it is well settled by a series of authorities (of which the latest is the case of *Phillips* v. *Eyre* (1) in the Exchequer Chamber) that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed. In the present case the whole question turns upon the second proposition. It is not disputed that the alleged wrong would have been actionable if it had been committed in England or on the high seas. It was, however, committed within the dominions of the Sultan of Muscat, who is duly proved to be an independent sovereign. It was committed in the territorial waters of Muscat, which

(1) L. R. 6 Q. B. 1.

are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway.

The appellant says that the act complained of was done under the authority and by the direction of the Sultan—that he adopted it as his act and declared it to be legal. In support of this assertion the appellant relies upon two documents—the proclamation of January 13, 1898, and the report of April 15, 1898, adopted and confirmed by the Sultan himself. The real question is, What is the true meaning and effect of these documents?

The respondents contend that the documents in question come to nothing more than this: that the Sultan of Muscat announced by formal proclamation that so far as he was concerned Her Britannic Majesty was welcome to seize munitions of war destined for Indian or Persian ports, if they were the property of British subjects, when found within the territorial waters of Muscat—that he would not resent such an act as an invasion of his sovereignty, and that afterwards on inquiry he declared that he was satisfied that Her Britannic Majesty had done no more than he had permitted her to do. I do not think that this was the meaning of these documents. I think the meaning was that the act, if done, was to be done under his authority, as his act, and that after inquiry he adopted the act as his own and declared it to be legal—legal that is according to the law of Muscat, which, for anything I know to the contrary, may be nothing more than the will and pleasure of the despot who rules over that country. If this was the true meaning of these documents, if the act was legal in Muscat and therefore justifiable there, in my opinion there is a conclusive answer to the action, and I am therefore of opinion that the appeal must be allowed.

LORD SHAND. My Lords, for the reasons which have been so fully stated by the Lord Chancellor and by my noble and learned friend Lord Macnaghten, I concur in thinking that the appeal should be allowed.

LORD BRAMPTON. My Lords, I agree.

H. L. (E.) 1901 CARR v. FRACIS TIMES & Co.

LORD LINDLEY. My Lords, I have come to the same conclusion. The seizure of cargo complained of in this case was made on board a British merchant vessel within the territorial waters of a foreign independent State, namely, Muscat. The defence to the action is that the seizure was lawful by the law of that State. If the defendant can establish this by satisfactory evidence the defence is unquestionably sufficient in point of law, and must prevail in this country. This was settled in *Blad's Case* (1), and has been frequently judicially recognised in modern times as clearly established, not only in the case of *Phillips* v. *Eyre* (2), but also in the case of *The M. Moxham* (3), where there is an admirable judgment by Mellish L.J.

The evidence adduced by the defendant in support of his defence consists of three documents, namely, first, of a certificate from Her late Majesty's Secretary of State for Foreign Affairs stating that Muscat was at the time in question an independent State and territory and that the Sultan was the sovereign ruler thereof; secondly, of a proclamation by him authorizing (amongst other things) British vessels of war to search vessels carrying the British flag in the territorial waters of Muscat and to confiscate all munitions of war in them if such munitions were intended for Indian or Persian ports and were the property of British, Persian, or Muscat subjects; thirdly, of a document which may be described as an inquisition, declaration, or certificate of a Court held by order of the Sultan of Muscat finding that the seizure was in every respect legal and in accordance with the permission given as already stated, and also finding that the munitions of war seized were intended for Persian ports. This decision was formally approved and agreed to by the Sultan himself, and he put his signature and seal to it.

No evidence was given to shew that this document did not truly represent the law of Muscat applicable to this case. In the absence of such evidence the declaration of the Court approved by the Sultan itself ought in my opinion to be accepted by the Courts of this country as sufficient evidence of

(1) (1673) 3 Sw. 603. (2) L. R. 6 Q. B. 1.
(3) (1897) 1 P. D. 107.

the law of Muscat, and as proving the legality by that law of the seizure complained of.

The plaintiffs complain of the finding by the Court in Muscat that the munitions of war were intended for Persian ports. I understand this finding to have reference to the proclamation as construed by the Muscat authorities and the Sultan. An English Court might, and probably would, construe the proclamation more narrowly than a Muscat Court or a Muscat lawyer. An English jury has found that when seized the munitions were intended for Muscat only. The truth is that when shipped, which was before the proclamation, they were intended for Bahrein, via Bushire or Muscat as most convenient; and that when at Port Said the plaintiffs' agents, who knew there was danger of seizure at Bushire, determined to send the munitions to Muscat. The proclamation by the Sultan of Muscat was not issued until after the munitions seized had left Port Said.

My Lords, the finding of the English jury, even if relevant for any purpose, does not, in my opinion, invalidate the declaration of the law of Muscat, or shew that the authorities who made it misconstrued the Sultan's proclamation which authorized the seizure, or did what was wrong by the law of Muscat. The seizure may have been harsh and despotic, but the plaintiffs' agents at Muscat never took the trouble to lay the real facts before the Muscat officials, and appearances were all against the plaintiffs. They were not formally summoned before the Muscat Court, but it is difficult to suppose that their agents did not know of the inquiry.

The Court of Appeal, from whose judgment I feel compelled to dissent, appear to have thought that, as at the time of seizure the destination of the cargo seized was Muscat, the seizure was unlawful by the law of Muscat, and that the defendants had failed to prove that the seizure had been subsequently legalised. This view of the finding of the Muscat Court, and its approval by the Sultan, ignores its value as evidence of the law of Muscat. I agree with the Court of Appeal that there was no judgment in our sense of the word either inter partes or in rem. The Court of Appeal

H. L. (E.) 1901 CARR v. FRACIS TIMES & Co. Lord Lindley.

also considered that the document signed by the Sultan was not equivalent to a special law with a retrospective operation so as to bring the case within the principle of *Phillips* v. *Eyre*. (1) It may be that the Court of Appeal were right on this point also, as there was no evidence apart from what appears from the document itself to shew what its true nature really was. But the document itself cannot be regarded as waste paper, or as no evidence of the law of Muscat.

Mr. Walton contended that the Sultan had no jurisdiction to give any one leave to search and take arms out of a British ship passing through his territorial waters in time of peace, and that the seizure, although sanctioned by the governments of Muscat, Russia, and the United Kingdom, was unlawful by the law of nations, and ought to be so treated by an English Court of law. But assuming that the British Government might have complained and demanded reparation if the British Government had not concurred in what was done, I am unable to see how an English Court can hold on general principles of international law only that the Sultan exceeded his own powers in stopping the transit of English munitions of war intended for Persia through his own territorial waters. Mr. Walton relied on passages in the judgments in the celebrated case of *Reg.* v. *Keyn* (2); but they do not, nor does any authority that I know of, justify your Lordships in going so far as this; and, in the absence of authority, your Lordships ought not, in my opinion, to accede to Mr. Walton's argument.

My Lords, I am of opinion that the decision appealed from ought to be reversed as the Lord Chancellor has moved.

Order of the Court of Appeal reversed and judgment of Grantham J. restored, with costs both here and below: Cause remitted to the King's Bench Division.

Lords' Journals, July 8, 1901.

Solicitors: *Treasury Solicitor; Hollams, Sons, Coward & Hawkesley.*

(1) L. R. 4 Q. B. 225; L. R. 6 Q. B. 1. (2) 2 Ex. D. 70.

[HOUSE OF LORDS.]

FRYER AND OTHERS . . . . . APPELLANTS;

AND

EWART AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1902 March 13.

Lease—Landlord and Tenant—Limited Company—Re-entry on Liquidation, Condition for—Solvent Company—Voluntary Liquidation—Forfeiture—Bankruptcy—Conveyancing and Law of Property Act, 1881 (*c.* 41), *s.* 2, *sub-s. xv.*; *s.* 14, *sub-s.* 6.

A proviso in a lease for re-entry, if the lessees being a company should enter into liquidation either compulsory or voluntary, applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only, and is "a condition for forfeiture on the bankruptcy of the lessee" within the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 6.

The decisions of Kekewich J. and the Court of Appeal, [1901] 1 Ch. 499, affirmed as to these points.

Horsey Estate, Limited v. *Steiger*, [1899] 2 Q. B. 79, approved as to these points.

In 1896 Ewart demised a public-house to Combe & Co., Limited, for thirty years subject to the proviso mentioned in the head-note. At the same time the company granted an underlease to Fryer. In 1898 the company, being solvent with a large surplus, went into voluntary liquidation for the purpose only of amalgamation with two other brewing companies, a new company called Watney, Combe, Reid & Co., Limited, being then formed, to whom the lease was assigned. The respondents, Ewart's trustees and executors, having brought an action in 1899 against Fryer and the new company to recover possession of the premises, Kekewich J., following *Horsey Estate, Limited* v. *Steiger* (1), made an order declaring that the respondents were entitled to recover possession of the premises as on a forfeiture of the lease, the premises to vest in Fryer for the residue of the sub-lease upon certain terms under s. 4 of the Conveyancing and Law of Property Act, 1892, and this order was affirmed by the Court of Appeal (Rigby,

(1) [1899] 2 Q. B. 79.

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Vaughan Williams, and Romer L.JJ. (1)). Against this decision Fryer and the new company appealed, but Fryer afterwards withdrew from the appeal, and no question relating to him was raised in this House.

1901. Dec. 17. *Warmington, K.C.*, and *J. D. Davenport*, for the appellants, Watney, Combe, Reid & Co., Limited. The proviso for re-entry in the lease of 1896 was for the protection of the lessors against an insolvent company. The Court of Appeal considered itself bound by its own decision in *Horsey Estate, Limited* v. *Steiger* (2); but that decision, if wrong, ought to be overruled. To cause a forfeiture the liquidation must be equivalent to bankruptcy: "a proceeding in law having . . . . effects or results similar to those of bankruptcy": Conveyancing Act, 1881, s. 2, sub-s. xv. Insolvency is the essence of bankruptcy, and does not here exist. That this is the meaning which must be attached to the word "liquidation" in a forfeiture clause in a lease is clear from s. 14, sub-s. 6, which excludes from relief cases in which there is "a condition for forfeiture on the bankruptcy of the lessee." If the respondents' contention were correct, that this applies to voluntary liquidation, the appellants would be deprived of all remedy. But sub-s. 6 makes it clear that the term "liquidation" in the statute and for the purpose of a forfeiture clause must be of the nature of bankruptcy or insolvency. In a partnership no one could describe a redistribution of assets as a bankruptcy; nor is the machinery for the reconstruction of a company a liquidation in this sense, though it is technically so and involves the incidents of a litigation.

Secondly, if there has been a forfeiture, the respondents have waived their right to insist upon it by the acceptance of rent on two occasions in the form of the appellant company's cheque after the publication of the statutory notices and the registration of the winding-up resolutions. Such notices are an advertisement to all the world of which the respondents cannot plead ignorance: *Emmerson's Case.* (3)

(1) [1901] 1 Ch. 499. (2) [1899] 2 Q. B. 79.
(3) (1866) L. R. 2 Eq. 231.

Thirdly, s. 14, sub-s. 1, applies to the case if there was a forfeiture which has not been waived.

[On this point no decision was pronounced.]

Fourthly, s. 14, sub-s. 6, does not apply, the liquidation being voluntary and not by reason of insolvency or pecuniary embarrassment.

Neville, K.C., Rolls Warrington, K.C., and *Methold*, for the respondents, were not heard.

The House took time for consideration.

1902. March 13. EARL OF HALSBURY L.C. My Lords, this was an action to recover possession of a public-house called the Boundary Tavern, which had been let on lease to a company for a term of thirty years.

The lease contained a proviso for re-entry: ". . . . Provided that if and whenever the lessees or their assigns being a company shall enter into liquidation whether compulsory or voluntary, then and in any such case it shall be lawful for but not obligatory upon the lessor or any person or persons duly authorized by him in that behalf into or upon the said demised premises or any part thereof in the name of the whole to re-enter and the said premises peaceably to hold and enjoy thenceforth as if these presents had not been made, without prejudice to any right of action or remedy of the lessor in respect of any antecedent breach of any of the covenants by the lessees hereinbefore contained."

It is not denied that the lessees, being a company, went into voluntary liquidation, and the first point raised is that, if the liquidation was for the purpose of reconstruction and not by reason of insolvency, the words above quoted do not apply. It is asserted and admitted by the respondents that here the liquidation was simply to reconstruct, and was not in any degree due to insolvency. I am unable, however, to see that this makes any difference. I am not entitled to introduce words into the instrument which the parties have not put there. This was a voluntary liquidation, and, whatever the motive might be for entering into it, the lessees did the very

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thing which, by plain and unambiguous language, was agreed to give a right of re-entry. But for the able and persistent argument of the learned counsel, I should have thought the language of the instrument was too plain to be susceptible of argument.

The other point to my mind is equally plain. It is, speaking broadly, whether the code concerning forfeiture contained in s. 14 of 44 & 45 Vict. c. 41 has any application at all to the forfeiture which, as I have said, was very plainly incurred by the liquidation. That depends on what interpretation is to be given to the words of sub-s. 6 of the code in question. By that sub-section it is expressly enacted that the section, which, as I have said, embraces a code for relief against forfeiture, is not to extend to a condition of forfeiture upon the "bankruptcy" of the lessee. Of course, but for the artificial and extended meaning given to the word "bankruptcy," this would not be such a condition; but it seems to me, when one reads that extended meaning given to the word "bankruptcy," I cannot doubt that liquidation by a company comes within it.

The words in s. 2, sub-s. xv., are these: "Bankruptcy includes liquidation by arrangement" (which I think does not refer to the liquidation by a company in this sense). But then come the words, "and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy." What could be more apt to describe the cessio bonorum, which in effect takes place, and the payment by some constituted authority of the creditors of the trading concern, and the distribution of its surplus property to its members, so that, but for the purpose of winding up, it ceases to exist as a trading concern at all? This was decided in 1899 by the Court of Appeal, and I think rightly decided; and, if so, we are remitted to the first point whether a forfeiture has been incurred.

Other questions have been raised with which I do not propose to deal, inasmuch as what I have said disposes of this appeal subject to one question of fact, which I only notice to say that so far as that question of fact, namely, "waiver," is concerned, I am entirely satisfied with the judgment upon it

by Kekewich J. and the Court of Appeal. Under these circumstances I move your Lordships to dismiss this appeal with costs.

LORD MACNAGHTEN. My Lords, in this case there was a lease of a public-house in the Commercial Road known as the Boundary Tavern. The term was thirty years from December 25, 1895. The lessees were the well-known brewers, Combe & Co., Limited. They granted an underlease to one Fryer. The lease to Combe & Co. contained a proviso that if and whenever rent should be in arrear for twenty-one days, or if and whenever the lessees should fail or neglect to perform or observe any of the covenants, conditions, or agreements contained in the lease, or if and whenever the lessees or their assigns, being a company, should "enter into liquidation, whether compulsory or voluntary," it should be lawful for the lessor to re-enter. In January, 1899, Combe & Co. went into voluntary liquidation for the purpose of amalgamating their business with that of some other brewery firms. Combe & Co. then applied for a licence to assign. The respondents, who were the successors in title of the original lessor, declined to grant such a licence, alleging that they were entitled to re-enter. The lease was then assigned without licence to the appellant company, and shortly afterwards the respondents brought this action against the appellant company and the underlessee to recover possession.

Kekewich J., before whom the case was tried, and the Court of Appeal concurred in holding that the respondents were entitled to re-enter, and also that the underlessee was entitled to protection, but only on certain terms, which were not altogether satisfactory to him. Both the appellant company and the underlessee appealed. But the underlessee has withdrawn from the appeal, and the contest now is only between the appellant company and the respondents. The substantial question between them was not argued in the Courts below. The case was taken to be covered by the judgment of the Court of Appeal in *Horsey Estate, Limited* v. *Steiger*. (1)

(1) [1899] 2 Q. B. 79.

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There it was held by Lord Russell C.J. and A. L. Smith and Collins L.JJ., that a similar proviso in the lease then under consideration was "a condition for forfeiture on the bankruptcy of the lessee" within the meaning of sub-s. 6 of s. 14 of the Conveyancing and Law of Property Act, 1881, a condition to which, as sub-s. 6 itself declares, s. 14 "does not extend."

Now comes the question, Was the Court of Appeal right in *Steiger's Case*? (1) Is the liquidation of a limited company "bankruptcy" within the meaning of that expression as used in the Act of 1881? I think it is.

In the Act of 1881, if I am not mistaken, the expression "bankruptcy" occurs only in the interpretation clause, s. 2, and in sub-s. 6 of s. 14. Sect. 2, sub-s. xv., is in these words: "Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy, and bankrupt has a meaning corresponding with that of bankruptcy." The expression "liquidation by arrangement" refers, of course, to liquidation by arrangement under the Bankruptcy Act, 1869, which was then in force. But it seems to me that the words which follow plainly include the liquidation of a limited company under the Companies Act, 1862. Having regard to the Companies Act, 1862, and s. 10 of the Judicature Act, 1875, it is impossible to deny that the liquidation of a limited company has "effects or results similar to those of bankruptcy," and it is to be borne in mind that it has been held that the provisions of the Judicature Act, s. 10, must be treated as applicable to every company in liquidation unless and until it is shewn that its assets are in fact sufficient for the payment of its liabilities and the costs of winding up: *In re Milan Tramways Co.* (2) And, therefore, where the condition of forfeiture is the entering into liquidation, the result of the liquidation is immaterial.

This conclusion is sufficient to dispose of the present case. Sub-s. 2 of s. 2 of the Conveyancing and Law of Property Act, 1892, which qualifies sub-s. 6 of s. 14 of the Act of 1881, and

(1) [1899] 2 Q. B. 79. (2) (1884) 25 Ch. D. 591.

which applied in *Steiger's Case* (1), does not apply to any lease of a public-house.

There were two other points suggested on behalf of the appellants: (1.) that without proof of actual notice publication in the *Gazette* is notice to all the world, as Lord Romilly seems to have held (*Emmerson's Case* (2)), and that therefore receipt of rent after the winding-up resolutions appeared in the *Gazette* was a waiver of the forfeiture; and (2.) that liquidation is only voluntary liquidation within the meaning of that expression as used in the lease to Combe & Co. when it is entered into unwillingly owing to the pressure of pecuniary embarrassment. These points were only faintly argued, and hardly require serious consideration.

I agree that the appeal must be dismissed with costs.

LORD DAVEY. My Lords, I have had an opportunity of reading and considering the judgments which have already been delivered, and that which has been prepared by my noble and learned friend opposite (Lord Lindley), and as they express my own views I do not trouble your Lordships by delivering a judgment of my own. I only desire to add that no distinction is made in the Companies Acts between one voluntary liquidation and another. In my opinion, it is not legitimate for the purpose of construing either a lease or the Conveyancing Act to inquire into the motives or objects which actuated the members of the company in entering into a voluntary liquidation.

LORD BRAMPTON. My Lords, I entirely concur in the judgment of the Lord Chancellor, and I have nothing to add.

LORD ROBERTSON. My Lords, I also agree in the judgment of my noble and learned friend on the Woolsack.

LORD LINDLEY. My Lords, Mr. Warmington, in his argument for the appellant, endeavoured to establish—

(1.) That there was no forfeiture.

(2.) That if there was it had been waived.

(3.) That s. 14, sub-s. 1, of the Conveyancing Act, 1881,

(1) [1899] 2 Q. B. 79. (2) L. R. 2 Eq. 231.

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applied to the case if there was a forfeiture which had not been waived.

(4.) That sub-s. 6 of s. 14 of the same Act did not apply.

Mr. Warmington did not ask the House to vary the terms on which relief had been granted by Kekewich J. and the Court of Appeal under s. 4 of the Conveyancing Act, 1892; he based his case on the broad ground that the lessors were not entitled to eject their tenant.

The first question turns entirely on the construction of the proviso for re-entry, and this is too plain to present any difficulty. The lessees were a company, and they did enter into voluntary liquidation by passing a resolution to wind up voluntarily. What their object was is quite immaterial; it was in this case with a view to reconstruction; it might have been for some other purpose. Whatever the object of entering into liquidation was, it is impossible to deny that one of the events on which the lessors stipulated for a right to re-enter indisputably happened. Similar language had to be construed in *Horsey Estate, Limited* v. *Steiger* (1), and both Lord Brampton (who tried the case) and the Court of Appeal held that the language was too plain to be got over.

The second question turns on the acceptance of rent after the forfeiture and on the correspondence which took place between the solicitors of the parties. This part of the case was very carefully gone into by Kekewich J., and he came to the conclusion that the plaintiffs had no such knowledge of what had taken place as to establish a waiver of their rights. The Court of Appeal took the same view, and on this point did not think it necessary to hear the other side. It is unnecessary to do more than say that, having attentively followed counsel's observations on this question of waiver, I see no reason to think that the conclusion thus arrived at is erroneous: I think it was right.

The third question does not appear to have been raised in the Courts below. At all events, it is not noticed in the judgments as printed; it is a very important one, but it is unnecessary to decide it. I therefore refrain from saying

(1) [1898] 2 Q. B. 259; [1899] 2 Q. B. 79.

more about it. But I do not wish to be understood as assenting to the argument addressed to us upon it.

This brings me to the fourth question argued by Mr. Warmington, namely, whether a voluntary winding-up of a solvent company with a view to a reconstruction is equivalent to a bankruptcy as defined by s. 2 (xv.) of the Conveyancing Act, 1881.

Unquestionably there are some very marked distinctions between bankruptcy (even as defined in s. 2, sub-s. xv., of the Conveyancing Act, 1881) and a winding-up, whether compulsory or voluntary. The main distinctions are as follows: (1.) In bankruptcy (and also in liquidations by arrangement under the Bankruptcy Act, 1869) the property of the debtor is divested from him and vested in a trustee for his creditors, whilst in a winding-up the property of the company is not divested from it. (2.) The doctrine of the relation of the title of a trustee in bankruptcy back to the act of bankruptcy does not apply to a winding-up. (3.) The doctrine of reputed ownership does not apply to a winding-up. (4.) A trustee in bankruptcy can disclaim onerous property, including a disadvantageous lease, but in a winding-up there is no similar power to disclaim. This is a very important practical difference when considering the position of lessors and lessees.

But notwithstanding these differences, the Court of Appeal held, in the case of *Horsey Estate, Limited* v. *Steiger* (1), that a voluntary winding-up was included in the word bankruptcy as used in the Conveyancing Act, 1881. There is much to be said in favour of this view; s. 2, sub-s. xv., of that Act gives a very wide meaning to the word bankruptcy: it includes "any proceeding in law having under any Act for the time being in force effects or results similar to those of bankruptcy."

Winding-up has many effects or results similar to those of bankruptcy. The following are the most important and striking:—

(1.) The cessation of the business of the company, except with a view to wind up its affairs, and the appointment of persons whose duty it is to take the control of all the company's

(1) [1899] 2 Q. B. 79, at p. 91.

H. L. (E.) 1902 FRYER v. EWART. Lord Lindley.

assets and realize them so far as may be necessary to pay the debts and liabilities of the company.

(2.) The debts provable, those entitled to preference, the rules as to set-off, as to secured debts, as to fraudulent preference.

(3.) The fundamental doctrine that all creditors (with a few exceptions) are to be paid pari passu out of the assets.

Further, it must not be forgotten that formerly trading companies could be made bankrupt (7 & 8 Vict. c. 111), and that by degrees the administration of the estates of companies being wound up has been made more and more similar to the administration of estates in bankruptcy. Still, I was impressed by Mr. Warmington's argument that a voluntary winding-up of a solvent company with a view to reconstruction was not a bankruptcy within the meaning of the Conveyancing Act, 1881. I am not, however, prepared to say that the Court of Appeal was wrong in deciding that it was. I accept their solution of this question.

Even if, therefore, Mr. Warmington was right in contending that this case came within s. 14, clause 1, he was wrong in contending that it did not fall within clause 6 of that section.

As the property leased is a public-house, it is unnecessary to consider the effect of s. 2, sub-s. 2, of the Conveyancing Act, 1892, for its application to this case is excluded by sub-s. 3 of the same section.

The appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 13, 1902.

Solicitors: *Bompas, Bischoff, Dodgson, Coxe & Bompas; Bolton & Co.*

[HOUSE OF LORDS.]

JOHN DOUGAN. . . . . APPELLANT;

AND

JAMES MACPHERSON . . . . . RESPONDENT.

H. L. (Sc.)
1902
Feb. 14.

Trust—Purchase of Beneficiary's Interest by Trustee—Non-disclosure of Valuation by Trustee.

The defender, who was one of the trustees and also a beneficiary under his parents' marriage contract, purchased the interest in the trust estate of his brother, who was not a trustee. At the date of the purchase the interest of the beneficiaries had vested absolutely, but the trust estate had not been realized, and its ultimate value was uncertain; but it was capable of being realized in the ordinary course of administration. Before purchasing his brother's share the trustee had in his possession a valuation of the trust estate made for the purpose of a loan on his own share. If the valuation turned out to be anywhere near correct, the trustee would make a profit of some hundred pounds on the purchase. The trustee never informed his brother of the valuation. On the brother being made bankrupt, the trustee in bankruptcy brought this action for reduction of the sale:—

Held, affirming the decision of the Court of Session, that the non-disclosure of the valuation rendered the sale null and void.

Lord Cairns' dictum in *Thomson* v. *Eastwood*, (1877) 2 App. Cas. 236, approved.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

John Dougan, the appellant, was one of the trustees under the ante-nuptial contract of marriage of his father and mother, and also under his father's will. Under both these deeds the fee of the children vested equally in the children of the marriage who survived their mother. The trust estate consisted of feu duties and heritable property. The respondent was the trustee in the sequestration and bankruptcy of James Dougan, one of the children of the above marriage. James Dougan was not a trustee under the deeds mentioned above. It appears that James Dougan had been for many years in a state of chronic impecuniosity. Many years ago a decree of cessio bonorum (not so far-reaching in bankruptcy as sequestration)

(1) (1901) 3 F. 553.

H. L. (Sc.) 1902 DOUGAN v. MACPHERSON.

was awarded against him, and his trustee in cessio was still in office at the date of the transaction given below. As early as 1893 James Dougan endeavoured to sell his spes successionis under his parents' marriage contract. Again in 1897 an abortive attempt was made to sell to the appellant. In 1898 negotiations were resumed, and on April 12 James Dougan made a written offer to sell his rights under the marriage contract and his father's will to the appellant for 400*l.*, the appellant undertaking to pay the debt in the cessio bonorum and certain other debts due by James. On April 17, 1898, Mrs. Dougan died, and the rights of the children, which were contingent on her death, became vested. On April 19 the appellant sent a written acceptance of James Dougan's offer of April 12. But James, on hearing of his mother's death, refused to carry out the transaction, and on the advice of counsel it was not insisted in. On June 14, 1898, the appellant obtained a valuation of the trust estate from Messrs. Thomas Binnie & Son. This valuation shewed the value of the share of James Dougan to be about 3500*l.* It was admitted this valuation was not at any time shewn by the appellant to his brother James Dougan. On January 12, 1899, James resumed negotiations for the sale to the appellant of his interest in his parents' property, and ultimately the transaction was carried out by the appellant paying James 450*l.* and his undertaking to pay James Dougan's debts under the cessio bonorum and other specified debts—in all, by a payment of about 2840*l.* This transaction left the appellant with a profit on the purchase. Immediately on receiving the 450*l.* in cash James Dougan left the country without making any provision for the payment of his debts not specified in the transaction with the appellant.

On March 22, 1899, James Dougan's estate and property were sequestrated, and the respondent James Macpherson was appointed trustee. On October 24, 1899, Macpherson as such trustee brought this action against the appellant for reduction of the sale to him of James Dougan's share. It appeared that the brothers were not on friendly terms, and that the appellant told James to go and talk to his own law agents about the transaction. James had a law agent acting for him, but this

agent's evidence was to the effect that he understood James Dougan was in possession of the whole facts, and how much the estate was worth to him: that James did not ask him to give any advice, but simply to carry out a transaction the heads of which had been arranged. There was some evidence that James had raised money from an insurance office and others, and that therefore he must have seen a similar valuation to Binnie's: that he had been lent money by his agents, St. Clair, Swanson & Manson, who also had a copy of Binnie's valuation: that St. Clair, Swanson & Manson guaranteed to pay the trustee in the sequestration his costs if the action was unsuccessful. The said agents also told James he was throwing away 1000*l.* entering into the contract with his brother. They were not the agents conducting the sale. In cross-examination the appellant said: "When I concluded the bargain I estimated that I would make a few hundred pounds. (*Q.*) If you were told that the profit would be between 800*l.* and 900*l.*, would that alter your opinion as to its fairness? (*A.*) I simply would not believe it. I do not see that fairness has anything to do with it; if a man sells at his own valuation and another buys, it has nothing to do with fairness. I did not personally at any time submit to him a statement of his interest under either deed. I was not called to do so, because I was never asked. (*Q.*) Did you think it was a duty upon you as trustee and holding a fiduciary relation to your brother to disclose to him the extent of his interest in the trust estate? (*A.*) Certainly not, when he could get all information from the law agents of the trust."

The appellant's contention was that James knew as much about the value of his share as the appellant did.

On July 18, 1900, the Lord Ordinary (Lord Stormonth-Darling) ordered repayment of the 450*l.* to the appellant, and the reduction of the agreement of sale. On February 22, 1901, the Second Division adhered. (1)

1902. Feb. 10, 14. *J. Crabb Watt* (of the Scottish Bar) and *J. George Joseph*, for the appellant. The decision of

(1) 3 F. 553.

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the Court of Session is erroneous. A bargain between a trustee and a beneficiary is not void, but voidable. There is no doubt that the onus is on the trustee to shew that the bargain was a fair one. Here the trustee cannot be charged with fraud, and the evidence shewed that the bargain was fair, and that the beneficiary had full knowledge. This is not an action by the beneficiary, but by a trustee elected by a creditor for the purpose, and the trustee has been guaranteed against loss by the petitioning creditor, Messrs. St. Clair, Swanson & Manson, whose unsecured debt was about 136*l.*, and the other unsecured debts amount to only 9*l.* 3*s.* 6*d.* Since 1893 the beneficiary has been trying to sell his interest. There was no advantage in shewing Binnie's valuation of 3500*l.* to the beneficiary when he knew the value was 3500*l.* Further, he had mortgaged his share with an insurance company, and they must have had the same valuation. The law agents under the marriage contract, and also, it was stated in evidence, Messrs. St. Clair, Swanson & Manson, had Binnie's valuation.

[LORD ASHBOURNE. How could the trustee be acting fairly with Binnie's valuation hid away in his pocket?]

[EARL OF HALSBURY L.C. Is there any evidence that he shewed Binnie's valuation to his brother?]

No. But the two brothers were at arm's length; and it is enough if the trustee shews that the same knowledge of value was in the beneficiary. Messrs. St. Clair, Swanson & Manson, who were James' agents, at least up to 1897, knew the value was 3500*l.*, and told James he was throwing away a thousand pounds in selling to his brother. It was a fact beyond dispute that James did not take the advice of any one of the agents he had.

[LORD MACNAGHTEN. Lord Cairns said in *Thomson* v. *Eastwood* (1): "There is no rule of law which says that a trustee shall not buy trust property from a cestui qui trust; but it is a well-known principle of equity that, if a transaction of that kind is challenged in proper time, a Court of Equity will examine into it, will ascertain the value that was paid

(1) 2 App. Cas. 215, 236.

by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the cestui que trust when it was sold."]

That dictum does not touch the case his Lordship was dealing with, and the principle is put much higher than that laid down by Lord Eldon in *Coles* v. *Trecothick*. (1) The valuation was made in respect of a loan on the trustee's own share, and there was no obligation on the trustee to exhibit it, as it did not come to his hand in a confidential character. There never has been a case where a bargain has been upset for concealing any knowledge which the trustee had not got in his position as trustee.

[LORD MACNAGHTEN. Wherever the trustee got the knowledge he was bound to communicate it. (2)]

The trustee must not keep to himself any knowledge he has got through the position of trustee—that is the limit, and the appellant has discharged the onus cast upon him of shewing the transaction was fair to the beneficiary. Lastly, Binnie's valuation was taken at thirty-two and a half years' purchase; but the evidence shews that only twenty-eight years' purchase could be got, and if even one year's purchase is cast off a great difference is made in the value of James' share.

[EARL OF HALSBURY L.C. What has the fact that the trustee may have made a bad bargain to do with the question of unfair advantage on the part of the trustee?]

A. Graham Murray, L.A., and *Robert Munro* (both of the Scottish Bar), for the respondent, were not called upon.

EARL OF HALSBURY L.C. My Lords, I cannot help saying that I feel somewhat surprised at the persistent argument that has been placed before your Lordships in this case in spite of the, to my mind, perfectly clear rule of equity which cannot be

(1) (1804) 9 Ves. 234, 246; 7 R. R. 167.

(2) See *Fox* v. *Mackreth*, (1788) 2 Bro. C. C. 400, 419; 2 R. R. 55, 66, where the Lord Chancellor said: "Suppose that A., knowing there to be a mine in the estate of B., of which he knew B. was ignorant, should enter into a contract to purchase the estate of B. for the price of the estate without considering the mine, could the Court set it aside? Why not, since B. was not apprised of the mine and A. was?"

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departed from, and upon which, for the first time, I believe, we are asked to place a different construction. Arguments have been addressed to your Lordships as if this were a question between two persons perfectly independent of each other, each man having a right to make the best bargain he can for himself. Undoubtedly, that was the view taken by the defendant here, for he frankly says so: "I do not see that fairness has anything to do with it; if a man sells at his own valuation and another man buys, it has nothing to do with fairness." He had no conception of the duty he himself owed as trustee to the person with whom he was dealing as beneficiary and cestui que trust.

The result to my mind is manifest. The defender acted in pursuance of what his own belief was, that he had no such duty at all, and that if he had secret information in his possession of what the value was he might by concealing that information obtain 300*l.* or 400*l.* more than if the person with whom he was dealing had been acquainted with the value which had been placed by a skilled valuer upon this property. Certainly, it is to my mind an absolute novelty to hear it gravely argued that such a transaction as that can stand. I think every learned judge who has dealt with this question has always said that a Court will regard with great suspicion such a transaction, and will call upon the trustee to shew that he has given full information—that he has kept back nothing, and that he has given an adequate price. Both these things fail here: the trustee did not give an adequate price. We know now that the price was too little in any view of it. He certainly did not communicate the information he possessed; and when I say that, it is not for those who are impeaching this transaction to prove negatively: it is for the trustee to prove affirmatively that the information was given.

To my mind it is perfectly manifest that the information was not given; and I say so for two reasons. In the first place, when the defender is challenged in cross-examination to shew that he did give it, he never suggests that he did; or shews that he had taken any means to do it, or that he had taken care that the information should reach his brother. On the

contrary, he says, "If he want to find out, let him go to his own agents and not come to me"—that is the line he takes. Therefore I assume, from his own statement, that he could not prove that the knowledge was imparted to his brother. There is another reason, applying one's common sense to it. Seeing the view that he took of his rights and of his own position, namely, that he was perfectly independent, that he was transacting business with a person to whom he owed no obligation at all, am I to suppose that he went out of his way to do what no ordinary person dealing with another would do—to shew him something which would enhance the value of the property he was buying? That is not the ordinary course of mankind. Although these were brothers, they do not seem to have been on particularly good terms with each other, and he himself repudiates the idea that he was giving anything out of the way to his brother. He says, "If he does not know, let him ask his own agents." My Lords, under these circumstances it seems to me that it is manifest that this transaction cannot stand. It is perfectly obvious to my mind that it must be set aside.

The only further observation I wish to make is that I am a little surprised to find that Lord Young in his judgment uses two phrases, and never gives any exposition of the facts in respect of which he uses them. He says: "There is no legal objection to a trustee under a settlement purchasing the interest of a beneficiary so long as the trustee acts uprightly and fairly"; and later on he says: "The transaction will be held to be legal if it is proved that the trustee has acted fairly and honestly": then the transaction will stand. That is quite true; but the whole question is upon what facts does his Lordship rely to justify the use of those adverbs, "uprightly," "fairly," and "honestly"? To my mind it was neither honestly, fairly, nor uprightly done, and the transaction must be set aside.

I therefore move your Lordships to dismiss the appeal with costs.

LORD ASHBOURNE. My Lords, I entirely concur. I think it is impossible to conceive a clearer case. It was the absolute

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and obvious duty of the defender in this case, if he thought he could maintain the transaction upon which he had entered, to have present to his mind the distinct duty which he owed to his brother. In his evidence he says, "I do not see that fairness has anything to do with it." I think that governs his entire conduct. He was thinking of the best kind of bargain he might obtain for himself. In common with all your Lordships who have taken part in this hearing, I am of opinion that that is not dealing fairly—that keeping back and non-disclosure, non-bringing forward of Binnie's valuation. It is a circumstance that cannot be explained and cannot be got over, and makes the case an overwhelming one for affirming the decision of the Court below.

LORD MACNAGHTEN. My Lords, I entirely concur. I must say I am surprised that this action was ever defended, and I am astonished that after two adverse decisions the appellant should have had the courage to come to this House.

As far as I am aware, there is no difference whatever between the law of England and the law of Scotland in relation to the duties and obligations of trustees when they are dealing with their cestuis que trust. I do not find that the law is stated anywhere more concisely and clearly than it was in the judgment of Lord Cairns which I referred to. I will not read the passage again, because I have read it twice already in the course of the argument: it is in 2 App. Cas. at p. 236.

Now, did the appellant in this case give full value? Clearly not. Did he give all the information he possessed to his brother? Most certainly he did not. He had in his pocket a valuation shewing exactly what, according to the opinion of a most experienced valuator, this property was worth. He had it in his room at the time when his brother called, and he did not shew it to his brother; he did not even give it to the agent —the person to whom he says his brother might have gone. That was keeping back information which it was his bounden duty to have conveyed to his cestui que trust. And it does not matter in the least how or under what circumstances the information was gained; if he had that information, he was

bound to place it at the disposal of his cestui que trust with whom he was dealing.

LORD SHAND. My Lords, I am of the same opinion, and I would not add a word to what has been said by your Lordships if it were not that the case is one coming from Scotland. With regard to the law of Scotland, I have only to emphasize what has fallen from my noble and learned friend who has last spoken. It has not been suggested that any distinction in the law of trusts applicable to such a case as this exists between the law of England and the law of Scotland. The fiduciary relation is the same: the duties and obligations of trustees in such cases are the same in Scotland as they would be in England.

Here the trustee plainly did not realize or appreciate the duty which lay upon him to give the beneficiary full information as to his position in entering into this transaction. He makes this quite clear by his own evidence. He had in his possession—I do not care how he acquired it—the valuation which has been so much spoken of. That is a fact, and that fact he was bound to disclose when he came to transact with reference to a proposed acquisition of the share of a beneficiary. He failed to do so, and the failure is fatal in the question of the validity of the transaction.

With regard to what Lord Young said and the expressions which have been referred to in the judgment of his Lordship, the Lord Chancellor, I will only say that it might have been possible to suggest that there was integrity, uprightness, and honesty on the part of the appellant if it had been a transaction between strangers, and if there had not been the relation of trustee and beneficiary subsisting between them; but the moment you bring into the case the circumstance that the appellant was a trustee having the duties lying upon him as a trustee in dealing with a beneficiary, and transacting or negotiating for the purchase of that beneficiary's share of the estate, the question of integrity and honesty drops out of the case. I do not say that he was acting fraudulently, but certainly he was acting in violation of the duty which he owed

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to his brother in his character of a beneficiary under the trust. Therefore, my Lords, I have no hesitation in saying that the case is an extremely clear one, and in concurring in the judgment proposed by your Lordships.

LORD BRAMPTON. My Lords, I concur in the judgment, and I cannot help saying that I think the appeal is a frivolous and vexatious one.

LORD LINDLEY. My Lords, I am of the same opinion. I will only add that no equity lawyer reading page 40 (1), and being told that that valuation was not disclosed by the trustee to his cestui que trust, could uphold this transaction for a moment.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 14, 1902.

Agents for appellants: *Ernest Salaman, Fort & Co., for Clark & Macdonald, S.S.C., Edinburgh.*

Agents for respondent: *Almond & Co., for St. Clair, Swanson & Manson, W.S., Edinburgh.*

(1) Page 40 of the Appendix, where the appellant says he had Binnie's valuation before him, and that he did not see that fairness had anything to do with it.

[PRIVY COUNCIL.]

HUMBLE . . . . . APPELLANT;

AND

HUMPHREYS . . . . . RESPONDENT.

J. C.* 1901 Nov. 6, 30.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Coal Mines Regulation Act, 1896, s. 38, *sub-s.* 1—*Construction —Payment of Miners according to Amount Excavated.*

The respondent having been convicted of contravening s. 38, sub-s. 1, of the New South Wales Coal Mines Regulation Act of 1896 by not paying his miners according to the actual weight gotten by them of the mineral contracted to be gotten:—

Held, that on the true construction of the section, as it appeared that by the contract of employment the miners were to be paid according to the yardage of excavation, which had no necessary or constant relation to the amount of mineral gotten, the Act was inapplicable and the conviction was erroneous.

APPEAL by special leave from two orders of the Supreme Court (Feb. 16, 1900) reversing in each case the decision of the stipendiary magistrate upon informations laid in respect of offences committed against the "Coal Mines Regulation Act, 1896."

The point decided was as to the true construction of the said Act (60 Vict. No. 12), s. 38, sub-s. 1, which is as follows:—

"38.—(1.) Where the amount of wages paid to any of the persons employed in a mine depends on the amount of the mineral gotten by them those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable. [There follows a proviso, not material for the purpose of this report, allowing agreed deductions "in respect of stones or substances other than the mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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to be gotten" and "in respect of any tubs being improperly filled" in certain cases.]

The facts were undisputed, and are stated in their Lordships' judgment.

The magistrate decided that the miners' wages depended on the amount of the mineral gotten by them, and that the defendant therefore, who had not weighed and had not paid according to the actual weight gotten, had committed the several offences against the Act charged in the informations. The magistrate based his judgment mainly upon the decisions in the cases of *Netherseal Colliery Co.* v. *Bourne* (1) and *Brace* v. *Abercarn Colliery Co.* (2), which were decisions as to the effect of the similar English statutes, 35 & 36 Vict. c. 76, s. 17, and 50 & 51 Vict. c. 58, s. 12, sub-s. 1. In *Netherseal Colliery Co.* v. *Bourne* (1) it was decided that, upon the proper inference to be drawn from the facts, the amount of the wages of the persons employed depended upon the amount of the mineral gotten by them—that is, upon the amount of coal gotten—and that therefore an agreement that slack should not be paid for was contrary to the statute, inasmuch as slack was not the less coal because it was slack. In *Brace* v. *Abercarn Colliery Co.* (2) the decision was that the amount of wages being dependent upon the amount of mineral—that is coal—gotten, a deduction made in respect of small coal was illegal, and could not be justified.

The Supreme Court, on special cases stated by the magistrate, decided that there was no evidence on which the magistrate could have found that the wages of the persons employed in the mine depended on the amount of the mineral gotten by them, and therefore the Act was not applicable.

Asquith, K.C., and *Vaughan Hawkins*, for the appellant, contended that the orders should be reversed and the convictions upheld. By the Act of 1896, where the amount of wages paid to miners depends on the amount of mineral gotten by them, payment by measurement is made illegal. Actual

(1) (1887) 19 Q. B. D. 357; (1888) 20 Q. B. D. 606; (1889) 14 App. Cas. 228.

(2) [1891] 1 Q. B. 496; 2 Q. B. 699.

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weighing is rendered necessary, the policy of the Act with regard to the whole class of miners being to confer upon them the protection resulting from a system of check-weighers and check-measurers, wherever payment by results is contemplated. The true construction of the agreement in this case is to that effect. The miners are to be paid for work done by them in excavating a seam of coal at so much a yard of the material excavated. Although the material excavated contains a percentage of dirt or dross, still the amount of wages to be paid depended on the amount of mineral gotten by them within the meaning of the Act. The magistrate so found, and there is evidence to support his finding. The offences proved were that the respondent did not cause the mineral gotten to be weighed, and did not pay according to the weight. They referred to the cases above cited by the magistrate, to *Kearney* v. *Whitehaven Colliery Co.* (1), and to Francis Williams and Pitt Lewis on "Coal Mines Regulation Acts, 1887–96," Appendix 7, as to the history of this legislation.

Cohen, K.C., and *Tyrell Paine*, for the respondent, contended that the evidence conclusively shewed that the wages paid to the miners were wholly irrespective of the amount of coal gotten, and that there was no evidence to justify the magistrate's finding to the contrary. Therefore, s. 38, sub-s. 1, of the Act of 1896 did not apply. The wages to be paid depended upon the amount of material, whether coal or not, excavated. The weight or amount of coal had nothing to do with it. The coal put into skips and sent out of the mine was mineral gotten within the meaning of the section. The material which was not coal was not mineral gotten within the said meaning, and did not require to be weighed. Payment depended on the work done, and not upon results, within the meaning of the sub-section.

Asquith, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. On December 29, 1899, Mr. Charles Newton Payten, a stipendiary magistrate for the police district

(1) [1893] 1 Q. B. 700.

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of Newcastle, in the State of New South Wales, on two informations by the appellant, who is inspector of collieries, convicted the respondent of having contravened the 38th section of the Coal Mines Regulation Act, 1896, of New South Wales. Special cases, having been required by the appellant, were stated by the stipendiary magistrate for the opinion of the Supreme Court. The cases were remitted to the magistrate, with the opinion of the Court thereon that his determination was erroneous in point of law. The determinations on both the two informations (of which one applied to one pair of workmen and another to another) were the same, the questions determined being identical.

The offence charged was that the men named in the informations, having been on the dates alleged persons employed in a mine to which the Coal Mines Regulation Act of 1896 applied, to wit, the Dudley Colliery, in the State of New South Wales, and in which mine the amount of wages paid to those persons did on those dates depend on the amount of mineral gotten by them, did fail to comply with the provisions of s. 38, sub-s. 1, of the Act, in that those persons were not paid according to the actual weight gotten by them of the mineral contracted to be gotten, contrary to the Act in such case made and provided. The New South Wales Act thus founded on is, so far as its enactments bear on the present question, an exact reproduction of the (British) Coal Mines Regulation Act, 1887. The question upon which this appeal turns is really whether, in the case of the miners named in the information, the amount of wages paid to them depended on the amount of the mineral gotten by them.

The facts are entirely undisputed. The men were employed in a coal mine. The agreement under which the men worked was in the following terms: "That they should receive payment by measurement for work done by them as miners in the said mine at the following rates, namely, 28*s*. per lineal yard for a bore of 8 yards, and 5 ft. 10 in. high, rising or falling 3*d*. per yard for every inch in thickness, wages to be paid fortnightly."

Primâ facie, and according to the terms of this agreement,

the remuneration of the men depends on the yard of excavation. It is important to observe what was excavated and how the material excavated was dealt with; and the following propositions are established, in so many words, in the evidence. The excavation went straight through the material encountered, taking everything that came on. The line of excavation is a direct line, minerals or no minerals. The same wages were paid through stone or other material. The men are paid the same rate, irrespective of what is hewn or taken out. "There is no difference; it would be the same as sinking a well." The material thus excavated and thus paid for was dealt with in the following manner: the dirt was thrown back into the bords, and the coal filled into the skips by the men and sent out of the mine by them. But the mineral thus sent out of the mine by the men was not weighed at all, nor is coal ever weighed at this colliery for fixing wages.

On these facts their Lordships find it impossible to hold that the amount of wages paid to these men depended on the amount of the mineral gotten by them. The amount of their wages depended on what is, in substance as well as in conception, a different criterion, namely, the amount of work done; and it was independent of the amount of mineral gotten by them. It is quite true that there is a relation between the amount of mineral and the amount of excavation, inasmuch as, more or less certainly, in greater or less degree, the more excavation the more mineral. But precisely the same reasoning would prove that payment by time was payment dependent on the amount of mineral gotten; for, again, the more time spent the more mineral gotten.

It was argued that in this particular colliery the proportion of stone to coal was very small, being only about 6 per cent. of stone to 94 per cent. of coal in the total output. But this is of course an average, and not a constant proportion; and the evidence shewed that men producing the most coal often get the smaller wages.

It is plain on the face of the section alleged to have been contravened and the relative sections that they are enacted for the protection of the miners against systems of calculating the

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amount of mineral gotten which involved risk of unfairness to men whose wages depended on such calculation. Their Lordships' ground of decision being that the section does not apply, it is unnecessary to say more than that it is satisfactory to observe that the system in force in this colliery does not seem to give occasion for any of the evils sought to be provided against. The measurement by yard is necessarily done, not above ground and in the absence of the miner, but in the mine, with themselves looking on and checking the measurement. No controversy can arise as to the material proper to be computed, for everything excavated is equally computed.

From the facts of the case it is manifest that the question now decided is wholly different and apart from those which have been under consideration in the several cases cited at the bar. In all those cases the men were paid by weight, and the dispute was about the mode of computing the weight and the proper deductions. The only bearing of the decisions on the present case is in the observations of the eminent judges on the true meaning of the section taken as a whole; and their Lordships have the satisfaction of finding that these remarks are entirely in harmony with the conclusion now arrived at.

Their Lordships have only further to observe that the argument of the appellant is in nowise furthered by the exemption clauses 38 (iv.) and 40 (vii.), for these are on the face of them merely exceptions from the enacting part of s. 38. If the hypothesis fails on which the enactment proceeds, the whole argument comes to the ground.

Their Lordships will humbly advise His Majesty that the appeal ought in each case to be dismissed and the orders of the Supreme Court be affirmed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Light & Galbraith.*

Solicitors for respondent: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

MAYOR AND COUNCILLORS OF EAST FREMANTLE . . . . . } DEFENDANTS;

AND

ANNOIS . . . . . PLAINTIFF.

J. C.* 1901 Nov. 5; Dec. 18.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia Municipal Institutions Act, s. 109—Exercise of Statutory Powers by Public Body—Compensation.

The appellant municipality, in the exercise of authority conferred by the Western Australia Municipal Institutions Act (59 Vict. No. 10), s. 109, and at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road:—

Held, that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred.

APPEAL from an order of the First Court (April 18, 1901) setting aside, on the ground of misdirection by the learned Chief Justice, the verdict and judgment, dated November 16, 1899, obtained by the appellants, and directing a new trial in an action of trespass in the said Supreme Court, in which action the respondent sued the appellants for an injunction and damages in respect of certain acts caused to be done by the appellants in pursuance of the powers and provisions of the Municipal Institutions Act, 1895.

The direction complained of and the facts of the case are stated in their Lordships' judgment. So also are the grounds upon which the Full Court set aside the verdict.

Haldane, K.C., and *Mark L. Romer*, for the appellants, contended that the direction of the Chief Justice, being to the effect that the defendants in order to escape liability must be found to have acted within their powers and for the benefit of the public, was sufficient, and a correct and proper statement of

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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the law. The appellants were authorized by s. 109 of the Act of 1895 to execute the works complained of. They determined upon the expediency of such works bonâ fide and after full deliberation. They did not in executing the works act arbitrarily, oppressively, or unnecessarily. No compensation is given by the Act to the respondent for any damage he may have sustained. With regard to the two grounds of non-direction and misdirection mentioned in the order of the Full Bench, it was contended that the Chief Justice did in effect direct the jury that it was the appellants' duty to consider and weigh the injury likely to accrue to the respondent or any other individual; and, on the other hand, the benefit likely to accrue to the district at large, and to take an honest view of the whole situation. He did not misdirect as imputed, for he said that if the appellants carried out the work for the benefit of the public, and in so doing acted neither arbitrarily, unnecessarily, nor oppressively, the respondent had no legal cause of complaint. Such direction, it was submitted, was a correct statement of the law. They referred to *Geddis* v. *Proprietors of Bann Reservoir* (1); *Metropolitan Asylum District* v. *Hill* (2); *British Cast Plate Manufacturers* v. *Meredith* (3); *Boulton* v. *Crowther* (4); *Vernon* v. *Vestry of St. James* (5); *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works.* (6)

The respondent did not appear.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellants are the council of East Fremantle, a municipality duly incorporated under the provisions of the Municipal Institutions Act, 1895 (59 Vict. No. 10). By that Act (s. 109) the council of a municipality is authorized to "make, alter, level, grade . . . . repair . . . . and otherwise improve all public places, streets, thoroughfares . . . . and other premises within the municipality." There is nothing said about compensation in respect of any consequential injury.

(1) (1878) 3 App. Cas. 430.
(2) (1881) 6 App. Cas. 582.
(3) (1792) 4 T. R. 794.
(4) (1824) 2 B. & C. 703; 26 R. R. 528.
(5) (1880) 16 Ch. D. 449.
(6) [1898] 2 Ch. 603.

In July, 1899, before the commencement of the work which has led to the present controversy, Sewell Street was a public street within the municipality. At that time it was little better than a cart track. In places it was almost impassable for vehicles owing to the unevenness of the ground. At its highest point, where the plaintiff has a wooden house which she bought in 1897 for 200*l.*, and on which according to her own account she laid out about 220*l.* more, there was a hillock or ridge with a gradient varying from 1 in 6 to 1 in 8. In accordance with the representations of a meeting of ratepayers the council resolved to improve Sewell Street. They determined to reduce the gradient opposite the plaintiff's house to 1 in 14½. The work was carried out according to the plans of their surveyor and under his direction. It is in evidence that before the street was improved it was impossible to go with a load of 5 to 7 cwt. up to the plaintiff's house with a single horse. It is clear that the alteration was not more than was reasonably necessary. The result, however, so far as the plaintiff was concerned, was that her house was left on the edge of a cutting with a drop of about six or eight feet to the road. This no doubt was a serious inconvenience to her. But it was proved that steps down to the road might be made at a cost of about 15*l.*

In these circumstances the plaintiff brought her action against the appellants, alleging in her statement of claim that they had "wrongfully, arbitrarily, negligently, and oppressively" made an excavation in front of her premises, and had thereby deprived her of access to her house. She claimed an injunction, or in the alternative 1000*l.* damages.

The action was tried before a Chief Justice and a common jury. In the course of his summing-up his Honour said: "It is well established that where a mayor and corporation do a public work in the interest of the public if a person suffers, unless the Act gives compensation to that private person, that private person cannot recover damages at the hands of the jury unless the mayor and councillors have gone outside their powers and have acted oppressively, arbitrarily, and unnecessarily. The question here for you, gentlemen, is to consider

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whether the town council in this case have gone outside their bounds, or have acted arbitrarily or oppressively. . . . . The one question for you is, Have the town council acted in such a manner?" His Honour concluded his address to the jury by telling them that if they were of opinion that the council had been acting wrongfully, arbitrarily, unnecessarily, and oppressively, then they might give a verdict for the plaintiff; but that if they were of opinion that the council had been acting in the best interests of the public at large, and that the plaintiff though she might have suffered some loss had been more than compensated for it by the increased value of her property, then they could not hold the council liable for damages, because the Act of Parliament made no provision for it.

The jury returned a verdict for the defendants, and judgment was given for them with costs.

The plaintiff then appealed to the Full Court. The order of the Full Court was that the verdict and judgment be set aside, and a new trial had on the grounds that:—

"1. The learned judge should have directed the jury that if the defendants undertook the work of cutting down the street complained of without properly considering or weighing the injury that must thereby accrue to the plaintiff, or that if the defendants carried out such work without any attempt to lessen or mitigate the injury to the plaintiff's property, the defendants were acting wrongfully, negligently, and oppressively.

"2. The learned judge misdirected the jury by directing that if the defendants carried out the work skilfully and for the benefit of the public the plaintiff had no legal cause of complaint."

The opinion of the Full Court, consisting of Stone and Hensman JJ., was delivered by Hensman J. After stating the facts and citing the case of the *British Cast Plate Manufacturers* v. *Meredith* (1), decided in 1792 by Kenyon C.J. and Buller and Grose JJ., and the case of *Boulton* v. *Crowther* (2), before Abbott C.J. and Bayley, Holroyd, and Littledale JJ. in 1824, his Honour expressed the opinion of the Court that "the doctrine of those earlier cases had been modified by principles which had been affirmed by the highest Courts of Appeal." In support of

(1) 4 T. R. 794. (2) 2 B. & C. 703; 26 R. R. 528.

that view reference was made to two cases in the House of Lords —*Geddis* v. *Proprietors of Bann Reservoir* (1) in 1878, and *Metropolitan Asylum District* v. *Hill* (2) in 1881—and to an observation of James L.J. in *Vernon* v. *Vestry of St. James* (3) in the Court of Appeal in 1880. His Honour added that in Victoria, in *King* v. *Mayor of Kew*, the Supreme Court had applied the general principle of those later cases to facts almost precisely similar to those then before the Court. The Court, he said, had some doubt whether they ought not to follow the Supreme Court of Victoria, and hold that the plaintiff was entitled to judgment; they thought that there certainly ought to be a new trial.

Their Lordships are of opinion that the order of the Full Court cannot be maintained. They think that the charge of the learned Chief Justice was, if anything, too favourable to the plaintiff. Topics were introduced which might have confused the issue. For example, it was not for the jury to consider whether the plaintiff had been compensated for the loss and inconvenience she might have suffered by the increased value of her property. In their Lordships' opinion, there was no case to go to the jury, and the jury ought to have been directed to return a verdict for the defendants.

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller J., and their view was approved by Abbott C.J. and the Court of King's Bench. At the same time Abbott C.J. observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of Gibbs C.J. in *Sutton*

(1) 3 App. Cas. 430. (2) 6 App. Cas. 582.
(3) 16 Ch. D. 449.

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v. *Clarke* (1), decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language Turner L.J. (2) observed in a somewhat similar case that "such powers are at all times to be exercised bonâ fide and with judgment and discretion." And in a recent case, where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act, the present Master of the Rolls, then Collins L.J. (3), observed that "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs."

In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

Their Lordships are of opinion that the principles laid down by Lord Kenyon and Abbott C.J. have not been in the slightest degree modified by the more recent cases referred to by Hensman J. They were all cases where, upon the true construction of the particular statute under consideration, the Court held that there was no intention of authorizing interference with private rights.

In *Geddis* v. *Proprietors of Bann Reservoir* (4) the defendants had flooded the lands of the plaintiffs, and had done so, as the Court held, without any statutory authority.

In *Metropolitan Asylum District* v. *Hill* (5) the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes, "what was the intention of the Legislature in any particular Act is a question in the construction of the Act." There it was held, as Lord Selborne pointed out, that there was no statutory right to commit a nuisance, and that no use of any land which must necessarily be a nuisance at common law was authorized. As Lord Blackburn

(1) (1815) 6 Taunt. 34; 16 R. R. 563.
(2) *Galloway* v. *Corporation of London*, (1864) 2 D. J. & S. 213, 229.
(3) [1898] 2 Ch. 613.
(4) 3 App. Cas. 430.
(5) 6 App. Cas. 582.

observed in a later case (1), quoting Bowen L.J., there was not to be found in the Act under consideration in *Metropolitan Asylum District* v. *Hill* (2) "any element of compulsion, or any indication of an intention to interfere with private rights."

In *Vernon* v. *Vestry of St. James* (3), in the very sentence quoted by Hensman J., James L.J. went on to say that he was of opinion that there was no legislation in the case authorizing the vestry to interfere with private rights. In an earlier part of his judgment the Lord Justice had observed, "there are no words here that authorize the vestry to commit a nuisance."

The learned counsel for the appellants was unable to refer their Lordships to a report of the Victorian case of *King* v. *Mayor of Kew*. If the effect of the judgment is correctly stated by Hensman J., their Lordships are compelled to express their dissent from it.

Their Lordships, therefore, will humbly advise His Majesty that the order of the Full Court ought to be discharged with costs, and the judgment of the Chief Justice restored.

The respondent must pay the costs of the appeal.

Solicitors for appellants: *Trinder, Capron & Co.*

(1) (1885) *Truman* v. *London, Brighton and South Coast Ry. Co.*, 11 App. Cas. 64.

(2) 6 App. Cas. 582.

(3) 16 Ch. D. 449.

[PRIVY COUNCIL.]

J. C.* 1901 Dec. 11, 12, 18.

CANADIAN PACIFIC RAILWAY COMPANY . . . . . } DEFENDANTS;

AND

ROY . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Acts done under Statutory Authority—Non-liability for Damage—Civil Code of Lower Canada, art. 356—Dominion Railway Act, ss. 92, 288—Construction—Practice—Special Leave to Appeal on Terms as to Costs.

A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute.

Geddis v. *Proprietors of Bann Reservoir*, (1878) 3 App. Cas. 430, 438, and *Hammersmith Ry. Co.* v. *Brand*, (1869) L. R. 4 H. L. 215, followed.

The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction contemplates the liability of a railway company acting within its statutory powers:—

So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

Appeal allowed, appellants to pay respondent's costs in accordance with the terms on which special leave to appeal was granted.

APPEAL from a decree of the above Court (Oct. 27, 1900) affirming a decree of the Superior Court for the District of Montreal (Dec. 5, 1899), whereby the appellants were condemned to pay to the respondents $300.

On March 9, 1901, an Order in Council granted special leave to appeal from the said decree of the Court of Queen's Bench upon the appellants depositing in the Registry of the Privy Council the sum of 300*l.* as security for costs, and upon submitting to pay the costs of this appeal incurred by the parties

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

on both sides in any event, if it shall appear advisable to the Lords of the Judicial Committee so to direct when the appeal comes on for determination.

The damages awarded had been suffered by reason of a fire set along the appellants' line of railway by their locomotive which extended to the respondent's premises.

At the trial the respondent did not offer any proof that the appellants or their employees had been guilty of any negligence or carelessness, or that the locomotive was in bad order, or not provided with good or the most modern apparatus for preventing the escape of sparks.

According to the judgment of Hall J. in the Court of Queen's Bench, the appellants proved that the locomotive was in proper order, and was properly provided with such apparatus, and was in charge of competent engineers. Bossé J. agreed with the Court below that the locomotive was not in proper order.

The judgment of the Superior Court (Langelier J.) was based on the following principal considérants :—

"Considering that the circumstances unfolded in the case leave no doubt that the fire was kindled either by sparks escaping from the locomotive, or by fire thrown in some other way from the train;

"Considering that there thence results a presumption of negligence or carelessness on the part of the defendants' employees in charge of the train, and that it was the defendants' duty to negative this presumption, which they have not done;

"Considering that the defendants were responsible for the damages caused to the plaintiff by the fire."

The appeal to the Court of Queen's Bench was on the grounds that, in fact and on the finding of the Court below, it had not been shewn that the fire was caused by any act of the appellants or their employees; and also that the respondent had failed to prove negligence; and that at any rate the appellants had disproved negligence; and that they were not liable by law. This appeal was dismissed on the following considérants and conclusion :—

"The Court . . . .

"Considering that the proof establishes that the fire was

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caused by sparks proceeding from one of the defendants' locomotives;

"Considering that the defendants, while authorized to operate their trains, are nevertheless liable for the damages which the use of this right may cause; and that in this regard they are subject to the rules of liability established in this province by the civil law of this province;

"Confirms for these reasons the judgment of the Superior Court, and dismisses the appeal with costs."

The question of law thus raised was whether as to the liability of railways for damage, done without negligence and in the exercise of their statutory authority, a different rule of law prevails in the province of Quebec from that established in the other provinces of Canada—in other words, whether the terms of the Dominion Railway Act (see the Railway Act of 1888) are to be controlled by the general law as to civil rights in Quebec.

The appellants are incorporated under and regulated by the laws of the Parliament of Canada; and their railway extends over all the provinces and territories of Canada, except the Island of Prince Edward.

The following articles of the Civil Code of the province of Quebec are relevant to the present case:—

Art. 356: ". . . . Civil corporations constituting, by the fact of their incorporation, ideal or artificial persons, are as such governed by the laws affecting individuals; saving the privileges they enjoy and the disabilities they are subjected to."

Art. 1053: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

"Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté."

Art. 1054: "He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control . . . . Masters and employers are responsible for the damage caused by their servants and

workmen in the performance of the work for which they are employed."

The judgment of the Court of Queen's Bench was delivered by Hall J., and, so far as is material, is as follows :—

"The appellants' argument is that as Parliament has given to them the statutory power to use locomotives for hauling their trains, the necessary use of fire in them, and the occasional escape of sparks from them, must have been anticipated, and therefore, if every reasonable precaution is taken against such escapes, the railway companies are relieved, in advance, of the consequence of any fires resulting from sparks accidentally escaping.

"The appellants admit that at common law they would be responsible for damage to others caused by fires from their locomotives, irrespective of the question of negligence on their part, but contend that the statute, by authorizing the use of locomotives, has taken away the common law liability, and left them responsible only for the effect of negligence. The English authorities support this position, commencing with the case of *Rex* v. *Pease* (1), followed by *Vaughan* v. *Taff Vale Ry. Co.* (2), *Fletcher* v. *Rylands* (3), *Smith* v. *London and South Western Ry. Co.* (4), and lastly the important case of *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Railway* (5), with the report of which we have been favoured by appellants' counsel, as found in 30 S. L. R. 587 (6), in which it was held: That the Legislature, by authorizing the use of steam-engines on railways, has impliedly indemnified railway companies against the consequence of the use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimising the risk of fire damage.

"The same principle has evidently been followed in those provinces of the Dominion in which the English law has been adopted, and by our Supreme Court in cases which originated in such provinces. See *New Brunswick Ry. Co.* v. *Robinson* (7),

(1) (1832) 4 B. & A. 30; 38 R. R. 207.
(2) (1860) 5 H. & N. 679.
(3) (1886) L. R. 3 H. L. 330.
(4) (1870) L. R. 6 C. P. 14.
(5) W. N. (1893) 29.
(6) See also 20 R. p. 35.
(7) (1884) 11 Can. S. C. R. 688.

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Canada Atlantic Ry. Co. v. *Moxley* (1), from Ontario, in which, although decided against the railway on the ground of negligence, the conclusion is to be inferred that without such proof the company would have been relieved under the statutory exemption.

"The appellants have conclusively established, we think, that the principle for which they contend is supported by English jurisprudence wherever that jurisprudence is in force, but in a matter pertaining to civil rights and liabilities in this province we are controlled by a different authority, which is binding upon us whenever it conflicts with the law of England, as it does upon this question, and under that authority we are of opinion that a different rule prevails. As Mr. Holt clearly puts the matter in his Canadian Railway Law, p. 18: 'The French law, and consequently the law in the province of Quebec, is that the [railway] company is always responsible, notwithstanding the adoption by them of every means of precaution known to science.' Upon such questions it is our duty to refer to the French jurisprudence and text-writers, not that that country dictates or enforces our laws, but because our civil law was derived from France, and finds there, therefore, its best exponents. Their jurisprudence is uniform and conclusive, and proceeds upon a principle derived from the Roman law which must commend itself to all as both equitable and just, namely, that no one may use his property in such a way as to injure that of his neighbour, 'Sic utere tuo ut alienum non lædas,' and the French authors carry this principle so far as to contend that even the Legislature has not power to violate it, and that whenever it confers special privileges upon an individual or a company, the reserve in favour of the neighbours' rights must be understood to have been intended."

Bossé J. referred especially to art. 1053, the operation of which, he said, cannot be prevented unless the law of incorporation has abolished it: "It does not contain any law new to us. True, it is contrary to the English jurisprudence, but it is our law, and we ought to apply it. It is of little consequence that a federal statute should have different effects

(1) (1888) 15 Can. S. C. R. 145.

in the different provinces, so long as these effects arise only from the application of a different civil law in force in each of the several provinces."

Blake, K.C., for the appellants, contended that these judgments should be reversed. They are right so far as they recognise that the legislation of the Parliament of Canada, affecting and regulating the appellants and all other Dominion companies and their railways, is similar in effect to the provisions contained in the English Railway Act, under the long settled construction of which the appellants would not be liable in this action. They are further right in the view that in all other provinces of Canada, except Quebec, the appellants and other Dominion railways would be rightly held by the Courts, following that settled construction, to be free from liability under such circumstances as appear in this case. Their error lies in holding that, in order to construe the Dominion Railway Act and ascertain its true meaning and effect, they are bound to act upon the general law peculiar to Quebec affecting property and civil rights, and to treat the Dominion Act as controlled thereby. This view loses sight of the main object and intention in conferring upon the Parliament of Canada special legislative jurisdiction so as to enable it to provide general and uniform legislation applicable to the subject-matter in all the provinces, regardless of any special provincial law applicable thereto as a matter touching "property and civil rights in the province" within the meaning of the British North America Act, s. 92, sub-s. 13. Dominion Acts in such cases override the provincial laws which otherwise would apply. Under those Acts there is a uniform regulation of the liability of Dominion railways in all provinces. That regulation, by the true construction of the Act of 1867, supersedes the special provincial rule; but the Court below has inverted this principle, and allowed the province to override the Dominion.

Then there is the further error of holding that the general law controls the construction of a statute. The reverse is the truth. The statute overrides the general law. Under the latter the appellants would be liable in England as in France,

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in Ontario as in Quebec. The exemption from liability arises both in England and in those provinces which have adopted the principles of English law entirely from special legislation, which overrides the general law, both where it is of English origin and also where it is of French origin. There is no more reason for rendering the statute of no effect in the province of Quebec than in any other province, because it overrides the general law which, before the invention of railways and the introduction of Railway Acts, was in all the provinces identical in substance, though derived from different sources.

Further, the judgments are wrong in importing into the discussion expositions of modern French law, decisions, and commentaries made since the invention of railways. Whether French legislation has attempted to exempt French railways from liability, and whether such attempts have been frustrated by the French Courts, cannot affect this case, which turns on the true construction of the Dominion Railway Act. Reference was made to *Bourgoin* v. *Montreal Ry. Co.* (1), and to *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2), and to *Port Glasgow* v. *Caledonian Railway*. (3)

Lomer Gouin, K.C., for the respondent, contended that the Courts below were right. He referred to the Civil Code of Quebec, arts. 356, 406, 1053, and 1054. The Courts have been right in following French jurisprudence in their construction of these articles. The series of cases cited by Bossé and Hall JJ. shew that the established rule in the province of Quebec is that railway companies and industrial establishments generally, whether authorized by statute or not, are bound to make good all damages caused by their operation in the same manner as private persons; and that it makes no difference that all precautions known to science have been taken to prevent damage occurring: see Richard, Traité de la responsabilité civile, p. 157, and Demolombe, vol. 12, p. 147, ed. 1885, and Sourdat, vol. 2, No. 1054. With regard to the cases, see *St. Charles* v. *Doutre* (4); *Crawford* v. *British Hospital for*

(1) (1880) 5 App. Cas. 381.
(2) [1899] A. C. 367.
(3) (1893) 30 S. L. R. 587; 20 R. 35.
(4) (1874) 18 L. C. Jur. 253.

Insane (1); *Fordyce* v. *Kearns* (2); *Chandler Electric Co.* v. *Fuller* (3); *Metropolitan Asylum District* v. *Hill* (4); *Canadian Pacific Ry. Co.* v. *Parke* (5); *Hammersmith Ry. Co.* v. *Brand* (6); *Grand Trunk Ry. Co.* v. *Megan* (7); *Jodoin* v. *South Eastern Ry. Co.* (8); *North Shore Ry. Co.* v. *McWillie* (9), affirmed by the Supreme Court in *North Shore Ry. Co.* v. *McWillie* (10); *Leonard* v. *Canadian Pacific Ry. Co.* (11); *Lemieux* v. *Cie. du Chemin de Fer Québec et Lac St. Jean* (12); *Canada Atlantic Ry. Co.* v. *Moxley* (13); *Citizens' Insurance Co.* v. *Parsons* (14); *Colonial Building Association* v. *Attorney-General of Quebec.* (15)

The province of Quebec has exclusive power to make laws in relation to property and civil rights in the province; and according to those laws there is no exemption from liability in this case. Moreover, as regards the effect of statute law, the particular section of the railway on which this fire occurred was operated by the appellants in virtue of an agreement made with the Montreal and Western Railway Company, and sanctioned by the Act of Canada, 53 Vict. c. 67 (1890). This agreement provided (inter alia) that the Montreal and Western Railway should complete the construction of the railway, and thereafter lease the same and their "powers, privileges, and franchises" in respect thereof to the appellants (with option of purchase). But the Montreal and Western Railway Company was originally incorporated under the name of the Montreal Northern Colonisation Railway Company by the Quebec Act, 32 Vict. c. 55, 1869: see s. 2, and also Quebec Act, 34 Vict. c. 23. Reference was also made to Canadian Act, 36 Vict. c. 82, ss. 1 and 7, to the Railway Act of Canada (1888), i.e. 51 Vict. c. 29, ss. 306, 307; and it was contended that in view of these enactments the appellants' authority to use locomotives on this

(1) 5 Montreal L. R. Sup. Ct. 70.
(2) (1870) 15 L. C. Jur. 80.
(3) (1892) 21 Sup. Ct. Rep. 337.
(4) (1881) 6 App. Cas. 193.
(5) [1899] A. C. 535.
(6) (1869) L. R. 4 H. L. 171.
(7) (1885) 1 Montreal L. R. (Q.B.) 366.
(8) (1883) 1 Montreal L. R. 316.
(9) 5 Montreal L. R. (Q.B.) 122.
(10) (1890) 17 Can. S. C. R. 511.
(11) (1889) 15 Quebec L. R. 93.
(12) (1893) 3 Quebec Sup. Ct. Rep. 192.
(13) (1888) 15 Can. S. C. R. 145.
(14) (1881) 7 App. Cas. 96.
(15) (1883) 9 App. Cas. 157.

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particular line of railway was derived from the Quebec Act of 1869, 32 Vict. c. 55, and that this authority had not been varied by subsequent Acts. Moreover, the Dominion legislation, especially the Railway Act, expressly maintains the liability of the appellants under provincial law: see 14 & 15 Vict. c. 51, s. 22; 22 Vict. c. 66, s. 125; Railway Act, R.S.C., 1886, s. 39; Railway Act, 1888, ss. 92 and 288.

Blake, K.C., replied.

1901 Dec. 18.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal by the Canadian Pacific Railway Company against a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court of Quebec whereby that company were held to be liable to damages to the extent of $300 for injuries to the plaintiff's property alleged to be caused, and now admitted to have been caused, by sparks escaping from one of their locomotive engines while employed in the ordinary use of its railway.

Some questions were raised in the Courts below, and to some extent referred to here, whether the judgment could be supported upon the ground of the appellants having been guilty of negligence in their management of the engine or its appliances being defective. No such question is now before their Lordships. By arrangement that question has been withdrawn, and their Lordships are not to be taken as giving any opinion whether there was any evidence of negligence, or, if there was, how that issue ought to be determined.

The serious and important question sought to be raised in this appeal is whether the railway company, authorized by statute to carry on their railway undertaking in the place and by the means that they do carry it on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway.

Both Courts below have held that in the province of Quebec the railway company is so responsible, and the question is whether that is the law.

The argument appears to be founded on the suggestion that Quebec has a civil law of its own, and that in that province all

corporations like all other persons are responsible for causing damage to their neighbours by a fault—that is to say, any actionable wrong, whether imprudence or want of skill; and another article of the Code provides that civil corporations constituting by the fact of their incorporation ideal or artificial persons are as such governed by the laws affecting individuals, saving the privileges they enjoy and the disabilities they are subjected to.

If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation without reference to what they are authorized to do in that capacity, the argument would be well founded; but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the province of Quebec; but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the Legislature, which is supreme, has authorized the particular thing so done in the place and by the means contemplated by the Legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code. The principle has been lucidly expounded by Lord Hatherley in the case of *Geddis* v. *Proprietors of Bann Reservoir* (1) thus:—

"If a company, in the position of the defendants there (2), has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers.

My Lords, I say the proper mode of executing those powers,

(1) 3 App. Cas. at p. 438.
(2) *Cracknell* v. *Corporation of Thetford*, L. R. 4 C. P. 629.

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because it appears to me that it is very neatly and appositely put by Mr. Baron Fitzgerald, in giving his judgment in the Court of Exchequer Chamber, in this form. Mr. Baron Fitzgerald says:—

'The substantial question raised on the pleadings in the first and second counts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.'"

And Lord Cairns in the case of *Hammersmith Ry. Co.* v. *Brand* (1) points out that it would be a repugnant and absurd piece of legislation to authorize by statute a thing to be done, and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done.

Lord Cairns said:—

"It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case that the railway could not be used for the purpose for which it was intended without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequences would be that action after action would be maintainable against the railway company for the damage which the landowner sustained; and after some actions had been brought, and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked—which, of course, is a reductio ad absurdum, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company."

This permission, of course, does not authorize the thing to be

(1) L. R. 4 H. L. at p. 215.

done negligently or even unnecessarily to cause damage to others. Much was argued by the learned counsel for the respondent as to the peculiar jurisprudence of Quebec; but in truth there is no such difference between the law of England and the law of Quebec in this respect as he seemed to suppose. The law of England, equally with the law of the province in question, affirms the maxim "Sic utere tuo ut alienum non lædas," but the previous state of the law, whether in Quebec, or France, or England, cannot render inoperative the positive enactment of a statute, and the whole case turns, not upon what was the common law of either country, but what is the true construction of plain words authorizing the doing of the very thing complained of.

The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty, and it seems to their Lordships it comes within the express language of the Code (art. 356).

But it is said that the Dominion Railway Act itself expressly maintains the liability of railway companies under provincial law for damages caused by their operation, and s. 92 is referred to. This may be disposed of in a sentence. That section refers to compensation under the Act, and not to damages in an action at all, which is what the question is here.

Sect. 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed.

Mr. Blake, for the appellants, having waived their right to recover damages or costs awarded in Canada to the respondent, their Lordships will humbly advise His Majesty that the judgment of the King's Bench, affirming the judgment of the

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Superior Court, ought to be reversed except as to costs. In the exercise of the discretion expressly reserved to their Lordships by the Order in Council granting leave to appeal, their Lordships direct the appellants to pay the respondent's costs of this appeal.

Solicitor for appellants: *S. V. Blake.*
Solicitors for respondent: *Fox & Preece.*

[PRIVY COUNCIL.]

J. C.* 1901 Nov. 6, 30.

HO TUNG . . . . . APPELLANT;

AND

MAN ON INSURANCE COMPANY, LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

(APPELLATE JURISDICTION.)

Adoption of Articles of Association—Registration of Unsigned Articles—Acquiescence.

Although a special resolution is the statutory mode of enacting articles of association, the adoption thereof by a company may be proved by a long course of acquiescence.

The unsigned articles of a company incorporated under Hong Kong Ordinance I. of 1865 (similar to the English Companies Act, 1862) were irregularly registered along with its memorandum of association; but it appeared that they had for nineteen years been published, acted on without objection, and from time to time amended and added to by special resolutions:—

Held, that they must be treated as valid and operative, and as having been adopted by the shareholders.

APPEAL from an order of the Supreme Court (July 3, 1900) affirming an order of the same Court in its original jurisdiction (Feb. 26, 1900).

The question raised in the appeal was whether the regulations of the respondent company are those contained in its articles of association as registered in Hong Kong, or are those con-

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

tained in Table A in the 1st schedule to the Companies Ordinance (Hong Kong), No. 1 of 1865, which, so far as is material to the appeal, is very nearly identical with the English Companies Act, 1862.

The directors of the company claimed the right to refuse certain transfers of shares to the appellant under clauses 27 and 28 of the registered articles. They had no such right under Table A.

Both Courts below held that the articles of association constituted the regulations of the company. The Chief Justice was of opinion that under s. 18 of the Ordinance the certificate of incorporation was conclusive as to the articles of association being the valid and operative articles of the company. Sercombe Smith J. held that the certificate was not conclusive, that the Court was free to examine whether any articles existed, and, it having been found that they were unsigned, the finding should be that they are not the regulations of the company.

Haldane, K.C., and *Kerly*, for the appellant, contended that, on the true construction of s. 18 of the Ordinance, the certificate of incorporation was not meant to be conclusive upon the question raised. It was proved that the articles had never been signed, and had never been formally adopted by the shareholders. Their registration was, under the circumstances, an irregularity, and could not have the effect of imposing a constitution upon the company which it had never adopted. By neglecting to pass articles of association the company had intimated its intention to be governed by Table A, and that intention could not be overruled by the registrar registering without authority articles which had never been signed or adopted, and which were, therefore, without force or effect.

Butcher, K.C., and *J. Austen-Cartmell*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated

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July 3, 1900, affirming a judgment of the same Court in its original jurisdiction dated February 26, 1900.

The sole question to be determined is whether the regulations of the respondent company are those contained in its articles of association registered in Hong Kong, or are those contained in Table A in the 1st schedule to the Companies Ordinance (Hong Kong), 1865, under the provisions of which the company was incorporated on March 14, 1881, as a company limited by shares. Sects. 6, 11, and 14 to 18 of the Ordinance are substantially and for all material purposes identical with the sections bearing the same numbers in the Companies Act, 1862, and Table A in the schedule to the Ordinance corresponds with Table A in the Companies Act.

By s. 14 it is enacted that the memorandum of association may, in the case of a company limited by shares, be accompanied when registered by articles of association signed by the subscribers to the memorandum of association. By s. 15, if the memorandum of association is not accompanied by articles, or so far as the articles do not exclude the regulations in Table A, those regulations become the regulations of the company; and by s. 17 it is enacted that the memorandum of association and the articles of association, if any, shall be delivered to the registrar, who is to retain and register the same.

In the present case the memorandum of association was duly signed by nine persons, and their signature was duly attested. The memorandum was accompanied by a small printed book purporting to contain "Articles of Association of the Man On Insurance Company, Limited," but these articles were not signed. The registrar, however, registered them with the memorandum, and thereupon gave a certificate of the incorporation of the company. The articles so registered have been in use by the company from that date until the present time. They have been twice amended by special resolutions which have been registered. In 1885 certain articles were added, and the special resolution was in the following words:—

"That at the end of the articles of association of the com-

pany there be added to and incorporated with the said articles the following regulations—that is to say," &c.

And in 1894 the resolution was "that article 72 of the company's articles of association is hereby cancelled, and that there should be substituted therefor the following regulation."

The present question has arisen in this way. A purchaser and transferee of shares in the company applied for registration. The registered articles contain a power for the directors to prevent and disallow the sale or transfer of shares to a transferee whom they do not consider a fit person to hold shares. In exercise of this power, the directors refused to register the transferee, who thereupon moved the Court to have the register rectified by registering him as the holder of the shares, and raised the question whether the directors had the power which they claimed to reject the transfer. It was contended that in the circumstances above stated the regulations contained in Table A were the only regulations of the company. The Chief Justice held that the enactment in s. 18 of the Ordinance, making the certificate of incorporation conclusive evidence that all the requisitions of this Ordinance had been complied with, applied to this case, and refused the motion. On appeal the Chief Justice adhered to his opinion; Sercombe Smith J. differed from him. The original order was, therefore, affirmed. It is not denied that if the company is governed by the registered articles the directors were entitled to reject the transfer. In Table A, on the other hand, there is no such power.

It appears, therefore, that these articles have been registered, and have been published and put forward as the company's only articles of association, and have been acted on, amended, and added to by the shareholders of the company, and the company's business has been conducted under the regulations contained therein for nineteen years without any objection, and the company on the record says that these articles are its articles of association. Their Lordships think that in these circumstances they are entitled to draw the inference that all the shareholders have accepted and adopted the articles as the valid and operative articles of association of the company.

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The articles of association stand on a very different footing from the memorandum, and are in the power of the shareholders themselves. The apparent object of requiring the articles to be signed before registration is to secure the adhesion of the only members of the company at that time to the regulations contained therein. It was no doubt as imperative on the registrar to require the articles to be signed before registering them as it was to see that they complied with the other requisitions of the Ordinance, as, for example, that they were printed and expressed in paragraphs numbered arithmetically. But there is no reason why the shareholders should not adopt them although irregularly registered. The statutory mode of doing so is by special resolution; but this again is only machinery for securing the assent of the shareholders, or a sufficient majority of them. In the *Phosphate of Lime Co.* v. *Green* (1) it was held that the company was bound by the acquiescence of the shareholders in an act done by the directors in direct violation of the articles of association, although there had been no alteration of the articles by a special resolution. In commenting on the cases arising out of the Agriculturist Cattle Insurance Company (2) Lord Cairns in *Ashbury Railway Carriage Co.* v. *Riche* (3) says: "If they had sanctioned what had been done without the formality of a resolution, it was quite clear that that would have been perfectly sufficient." He adds: "So also in the case of the *Phosphate of Lime Co.* (1), the question was whether that had been done by the sanction of the company which clearly might have been done by a resolution passed by the company."

Their Lordships think that, by the acquiescence and agreement of the shareholders shewn by a long course of dealing, the registered articles have become and are the articles of association of the company as surely as if they had been formally adopted by special resolution.

(1) (1871) L. R. 7 C. P. 43.

(2) *Spackman* v. *Evans*, (1868) L. R. 3 H. L. 171; *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Houldsworth* v. *Evans*, L. R. 3 H. L. 263.

(3) (1875) L. R. 7 H. L. 653, at p. 675.

They will, therefore, humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Solicitor for appellant: *G. A. King.*
Solicitor for respondents: *Walter F. Currey.*

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[PRIVY COUNCIL.]

HULL ELECTRIC COMPANY . . . . PLAINTIFFS;

AND

OTTAWA ELECTRIC COMPANY AND THE CORPORATION OF THE CITY OF HULL . . . . . DEFENDANTS.

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Dec. 12, 14.
1902
Feb. 22.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Powers of Provincial Legislature—Quebec Act, 58 Vict. c. 69—By-law of Corporation granting Exclusive Rights—Construction.

Under a by-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a licence previously granted by the city to the respondents for a similar purpose:—

Held, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the provincial legislature, and none the less so because it excluded for a limited time the competition of rival traders:—

Held, also, that by the true construction of the by-law the city did not themselves revoke the licence to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected.

APPEAL from a decree of the Court of King's Bench (Dec. 21, 1899) reversing a decree of the Superior Court for the province of Quebec (Jan. 31, 1899), sitting in review at Montreal, which had reversed a decree of the Superior Court for the province of Quebec district of Ottawa (June 10, 1898) dismissing the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

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appellants' action with costs, and maintaining the intervention of the respondents, the corporation of Hull.

The action was brought in May, 1897, by the appellants and Viau against the respondents, the Ottawa Electric Company, for

(*a*) An order to compel them to remove all poles, wires, and the electrical apparatus occupied, possessed, owned, or used by them for the distribution of electricity or electric light in the city of Hull.

(*b*) An order restraining them from selling or supplying electric light to the said city, the inhabitants thereof, or the industries therein.

(*c*) $20,000 damages, viz., $10,000 to Viau and $10,000 to the appellants.

The action was based on the contention that the appellants and Viau had acquired in May, 1894, and had since then had the exclusive right to supply electricity and electric light in the said city.

The respondents, the Ottawa Electric Company, denied that the appellants and Viau had or were entitled to the exclusive rights claimed, or that they were infringing any of the rights or privileges of the appellants or Viau, and alleged that they were only exercising their strict legal rights in accordance with the resolution of the town council of the city of Hull passed on April 4, 1887.

The respondents, the city of Hull, intervened to dispute the monopoly claimed.

The transactions from which the appellants and respondents respectively claimed and disputed the monopoly in suit are set out in the judgment of their Lordships.

The respondent company was incorporated under Dominion statute, 57 & 58 Vict. c. 111; the appellant company under Quebec statute, 58 Vict. c. 69. Sect. 24 of the latter Act is as follows:—

"The grant to the said Théophile Viau heretofore made by the corporation of the city of Hull and its council of certain franchises and privileges including, amongst others, for a period of thirty-five years, the exclusive right and privilege of constructing and equipping an electric railway in the city of Hull and in and

upon the streets thereof, and of making all erections and works necessary for the same, and also the exclusive right and privilege for the period of thirty-five years of furnishing and supplying electric light to the corporation of the city of Hull and to the inhabitants thereof, and to all industries and manufactories that are established and may be established therein, and of erecting such poles, apparatus, appliances and electric machinery in the city of Hull and the streets thereof as may be necessary for such purposes and for the due development and distribution of such light, and including the right, privilege and franchise of supplying, selling and leasing such heat and motive power generated by electricity, or otherwise to the inhabitants, industries, manufactories and dwellings and other buildings that may require the same, and of making such erections and structures in the city of Hull and in the streets thereof as may be necessary for such purposes, and the exemption of the railway and works, and all machinery, plant and other property movable and immovable, and other things connected therewith or used in connection with the same from municipal taxes and rates for the period of fifteen years, and the by-law containing the same and the provisions thereof, that is to say, By-law No. 61 of the corporation of the city of Hull and its council, are declared to be legal and valid, and the said franchises, privileges, rights and exemptions therein contained are declared legal and binding upon the corporation of the city of Hull."

The First Court's decree proceeded on the ground that, while the city council might have the control over the placing of posts, wires, and other apparatus on its streets for the purpose of supplying electric light, it had no power to prohibit or restrict the supplying of electric light; that electric light is a commercial commodity, the regulation of the trade in which is within the exclusive competence of the Parliament of Canada; and that thus the confirming Act was beyond the competence of the legislature of Quebec; that the exclusive powers created by the by-law and Act as to the use of the streets are only accessories to the exclusive power of supplying electric light; and that, the principal grant being void, the accessories fall with it, and are also void.

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The principal reasons of the judgment in review were that the by-law granted an exclusive right to establish a system of electric light and heating in the city; and for that purpose an exclusive right to use the city streets for the placing of the necessary posts and apparatus; but did not grant an exclusive right to supply electricity; and, in consequence, other persons might furnish such supply, not using the streets for the purposes of posts and wires.

It was considered that the city had power to concede the exclusive right above described, and that thus no question of unconstitutionality could be maintained.

It was further considered that the licence to Ahearn and Soper, the predecessors of the respondent company, by resolution only and not under by-law was in its essence revocable, and that it was incompatible with the exclusive grant to Viau; that the effect of the grant was to enable Viau to insist on the revocation of the former licence, without which result he could not enjoy his exclusive rights, and that the licence had been revoked.

The Court in effect found that the use of the city streets for the purpose of placing posts, wires and apparatus was necessary to the establishment of the contemplated system of lighting and heating in the city.

The Court of Queen's Bench restored the decree of the First Court. They held that the city by-law, in granting the exclusive privilege for thirty-five years of establishing a system of lighting and heating, had created a monopoly beyond its charter powers; that the confirmatory Act was ultra vires; that the by-law, even if valid, had not given the Hull Company the use of the streets; that the servitude claimed by the Hull Company in the streets did not entitle it to the removal of the Ottawa Company's posts and wires; and that the Ottawa Company had the right to place its posts and wires on the streets, in virtue of the licence to Ahearn and Soper, which had not been revoked.

Blake, K.C., for the appellants, contended that the decree of the Review Court was right and should be affirmed. On the

true construction of the by-law, it gave to Viau and the Hull Company, as his representatives, the exclusive privilege for thirty-five years of using the city streets for the purpose of therein placing, maintaining, and employing posts, wires, and apparatus for the supply of electric light and heat in the city. The confirmatory Act interpreted and validated the by-law in that sense. That Act was within the competence of the provincial legislature. The city in its intervention did not plead that the by-law or Act was wholly void, but only that it was ultra vires so far as it created a monopoly. No exclusive right, however, was given to furnish light or heat to any person or corporation. All that was given was an exclusive right to establish a system of lighting by electricity, and an exclusive right to use the streets in a particular way for that purpose. That scheme did not involve an exclusive right to supply, and was a purely local undertaking within the competence both of the local legislature and the corporation; even assuming that the grant of an exclusive right to supply the corporation with electric light and heat would have been ultra vires, a point which does not arise. It is unnecessary for the appellants' case to contend that the statute enlarged the effect of the by-law. The privileges granted by the law cannot be treated as subordinate to those granted by the resolution of 1887. The latter must give way. No time limit was fixed for the exercise of the rights which it conferred. It was, therefore, revocable at any moment. The passing of the Act operated as a revocation, of which the Ottawa Company was bound to take notice. Their rights under the resolution were incompatible with the appellants' rights under the by-law and Act. It was contended that at the least the Ottawa Company should be restrained from using or maintaining for the purpose of supplying electric light or heat the posts and wires placed in the city streets—more especially the posts and wires which were placed, and the supply which had been extended, after the creation of the rights of Viau, or after the date at which the licence of 1887 should be deemed to have been revoked.

Haldane, K.C., L. N. Champagne, K.C., and *Loehnis,* for the respondents, the City of Hull Corporation, contended

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that the judgment appealed from was right. The main question at issue was as to the due construction of the by-law and statute. The corporation had never revoked the resolution of 1887, under which the Ottawa Electric Company had acted and claimed until revocation to act. The by-law and statute did not derogate from that right, and were not intended to do so. They did not intend to exclude the exercise of the rights of the company granted by the resolution and acquired by them from Ahearn and Soper. They did not purport to grant to the appellants an exclusive use of the streets of the city. All that the by-law purported to give was an exclusive privilege of establishing a system of lighting by electricity, natural gas, or otherwise. That privilege might be used or neglected. No obligation was imposed on the appellants to establish such a system or to find any capital for that purpose. If the statute in terms gave more, it was controlled by the preamble, which limited its operation to confirming what had been done by the corporation. The only claim which the appellants might have to an exclusive use of the streets would be for the purposes of an electric tramway. The monopoly claimed by the appellants must result from a strict construction of the by-law, and cannot be created by inference.

Belcourt, K.C. (*Haldane, K.C.*, with him), for the Ottawa Electric Light Company, also contended that the effect of the by-law and Act was only to grant to the appellants such rights as the corporation possessed and could grant, and to except from the grant the rights and franchises previously granted to the predecessors of the company. There was no intention to impair those rights, according to any reasonable construction of the by-law. The right given was an exclusive privilege to establish a system of lighting by electricity; that is, that if the appellants acted upon it and established such a system, no future competitor would be authorized to interfere with them. But it was not a necessary or a reasonable construction that an existing system, of which they had notice that it was in full operation, and of the cancelment of which nothing was said, should be forthwith abolished, to the injury of the public as well as the company. An exclusive privilege to establish a

system hereafter is quite consistent with the respondents' continuing to work the system which they had already established and which had been in operation for several years. That construction of the by-law is to be preferred which will protect the existing rights and position of these respondents in the absence of a clear intention that they should be revoked or destroyed. Even if the use of the streets was given to the appellants, it was not an exclusive use, but one concurrent with the respondents' user of them: see *Hill* v. *Tupper*. (1) [*Blake, K.C.*, referred to *Nuttall* v. *Bracewell*. (2)] The respondent company was incorporated by Dominion Act, 57 & 58 Vict. c. 111, and its property, business, and franchises became vested in it. It thereupon took over its system of electric lighting, and has ever since operated the same, with the consent, authority, and co-operation of the city. With regard to the effect of this Act and the permanent, irrevocable nature of the privilege granted to the respondents, see *La Compagnie pour l'Eclairage au Gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe* (3); *Liggins* v. *Inge* (4); *Winter* v. *Brockwell* (5); *Morgan* v. *Lailey* (6); Hardcastle on Statutory Law, pp. 275, 276; *Bernardin* v. *Municipality of North Dufferin*. (7) Unless the power to revoke the franchise or licence is reserved, such licence or franchise cannot be revoked, especially if a large outlay has been made to the knowledge and with the consent of the city on the faith of its continuance. And in any view a revocation has not been expressly made; what is relied upon is an implied delegation of the power to revoke, and an implied exercise by the appellants of a power so delegated.

Blake, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In March, 1887, Ahearn and Soper applied to the mayor and aldermen of the city of Hull, stating that they had organised a company for the purpose of supplying

(1) (1863) 2 H. & C. 121.
(2) (1866) L. R. 2 Ex. 6.
(3) (1895) 25 Sup. Ct. Can. 168.
(4) (1831) 7 Bing. 682; 33 R.R. 615.
(5) (1807) 8 East, 308; 9 R. R. 454.
(6) (1874) 33 Q. B. (Can.) 369.
(7) (1891) 19 Sup. Ct. 581.

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the city with electric light, and asking for permission to erect their poles in the streets. On April 4, 1887, the city council passed the following resolution: "That the petition of Mr. Ahearn and Mr. Soper asking that they be permitted to erect within the limits of the city poles for the establishment of their system of electric light be granted under such restrictions and regulations as are observed in Ottawa and subject to the instructions of the committee on streets and improvements as to the places where these poles shall be erected." The company on whose behalf Ahearn and Soper were acting was the Chaudière Electric Light and Power Company, Limited. They transferred their rights and assets to the respondents, the Ottawa Electric Company, hereinafter called the Ottawa Company.

Under the permission granted by the foregoing resolution the Chaudière Company established a system of electric lighting in the city of Hull. It was continued and extended by the Ottawa Company, and is still in operation.

In 1894 one Viau, described as a contractor, presented a petition to the city council setting forth the importance of establishing a line of electric cars connecting the city with certain neighbouring places, and also the advantage of establishing a system of lighting and heating for the city by electricity, natural gas, or otherwise, and praying for special privileges in the shape of exclusive rights for a certain term of years, and a temporary exemption from taxes in order to enable him to carry out his enterprise.

On May 7, 1894, the city council, under its corporate seal, passed a by-law, known as By-law No. 61, in reference to Viau's scheme.

Under the 1st and 2nd paragraphs of this by-law Viau obtained an exclusive privilege of constructing and maintaining a railway worked by electricity or any other motive power, except steam or horse power, connecting the city with certain neighbouring places, and passing over one or more of the city streets.

Paragraphs 3 and 4 were in the following terms:—

"3. From the date of the publication of the present by-law

the said Theophilus Viau, whether personally or with other persons with whom he shall think fit to associate himself and his or their heirs or legal representative, shall have an exclusive privilege during 35 years to establish in the city of Hull a system of lighting and heating by electricity or by natural gas or otherwise.

"4. The city of Hull by the present by-law grants to the said Viau individually, or through the society or company which he may think fit to form later, the exclusive rights mentioned in paragraphs 1 and 3 such as it possesses and as it has the right to grant this day."

Then followed among other provisions a provision to the effect that, in case the proposed works were not commenced within two years from the date of the publication of the by-law, the concession should become null and void.

The Hull Electric Company, hereinafter called the Hull Company, was promoted for the purpose of working Viau's concession. It was incorporated by an Act of the Legislature of Quebec, 58 Vict. c. 69, passed on January 12, 1895. By this Act, By-law No. 61 and the provisions thereof were declared to be legal and valid, and the franchises, privileges, rights, and exemptions therein contained were declared legal and binding upon the corporation of the city of Hull.

After some delay, but within the time limited by the by-law, the Hull Company commenced their works. They proceeded to construct the proposed railway, and also established a system of lighting by electricity in competition with the Ottawa Company.

The Hull Company, finding that the operations of the Ottawa Company interfered with their profits, issued a written protest dated March 17, 1897, and thereby required the Ottawa Company to remove their appliances and to desist from supplying electric light by means of their system. The protest proved ineffectual, and on May 10, 1897, the Hull Company commenced the action which has led to this appeal.

This action, in which the city of Hull intervened with the view of supporting the Ottawa Company, was tried before the Superior Court. The trial judge, Lavergne J., dismissed the

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action with costs, holding the by-law bad and the Quebec Act void on the ground that electric light is a commercial commodity, and that therefore the regulation of trade in it falls within the exclusive competence of the Parliament of Canada.

The Superior Court, sitting in review, reversed this judgment, and ordered the Ottawa Company to remove their posts and wires, and to pay $200 as damages accrued during the period which elapsed between the date of the protest to the institution of the action. They held that the city had power to grant Viau's concession; that the by-law properly construed was not invalid; and that the Quebec Act was not unconstitutional. They further held that the licence to Ahearn and Soper was revocable; that it was incompatible with the exclusive grant to Viau; that the effect of that grant was to enable Viau to insist on the revocation of the former licence, and that the licence had in fact been revoked either by the Quebec Act, or at latest by the protest of March 17, 1897.

The Court of Queen's Bench on December 31, 1899, reversed the judgment of the Court of Review, and restored the judgment of the Superior Court. The judgment in the Queen's Bench was given by Lacoste C.J. The decision was rested on two grounds. In the first place, agreeing with the Superior Court, the Court of Queen's Bench held the by-law bad and the Quebec Act unconstitutional. In the second place, the Court considered that the licence granted to Ahearn and Soper did not require the formality of a by-law, and that the resolution of April 4, 1887, was valid for the purpose in view. They doubted whether such a licence was revocable, at all events without compensation. They thought that at any rate an express revocation was necessary. The city had not in their view delegated to the Hull Company any power of revocation. Their conclusion, therefore, was that the Hull Company could not prevent the Ottawa Company from supplying electric light, or using for that purpose the posts and wires which it had placed in the streets of Hull under the permission accorded by the resolution of April, 1887.

The first ground on which the Chief Justice bases his decision may be laid aside. It was abandoned at the bar by

the leading counsel for the respondent. It is obviously untenable. The scheme in favour of which By-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the provincial legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders.

Nor is there any difficulty with respect to the resolution of April, 1887. Ahearn and Soper asked for nothing more than a permission in its nature revocable. Nothing more was given to them. There seems to be no reason why such a permission should not be granted by a simple resolution and recalled in a similar manner.

The real difficulty of the case lies in determining the true meaning and effect of By-law No. 61. In approaching the question it must be borne in mind that at the time when that by-law was passed the Ottawa Company had, in accordance with the resolution of April, 1887, and by the express permission of the council, established a system of electric lighting in the city of Hull, and that they were actually supplying the municipality with electric light under a contract which was only terminable by a notice to be given on a distant day in the current year, and which if not so terminated would run on from year to year until terminated by a like notice on the same day in some following year. Viau, of course, was quite aware of the position of the Ottawa Company. Indeed, it is not disputed that paragraph 4 of the by-law was intended to place on record the fact that the Ottawa Company had at the time a system of electric lighting in operation in the city. At first sight, no doubt, the grant to one person, or to one body of persons, of the exclusive right to establish a system of electric lighting within a particular area seems hardly consistent with the continuance within the same area of a similar system of lighting in the hands of another body carrying on operations under a revocable licence from the very same grantors. But the two things are not incompatible. Now, it seems quite clear that it was not intended that the licence granted by the resolution of 1887 should be revoked off-hand by the by-law

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itself. An immediate revocation would have exposed the municipality to a serious liability for breach of contract; and it would have caused no little inconvenience to the municipality and the private customers of the Ottawa Company. There was no other source of supply available; there was no immediate prospect of obtaining a supply through Viau's scheme. Moreover, it is to be observed that the by-law itself provided that in the event of the proposed works not being commenced within two years the concession should drop, and, even if the works were commenced within the prescribed period, it would not follow that Viau's system of electric lighting would ever be established. Viau and his associates might find it more to their advantage to confine their operations to the electric railway. Then if the by-law did not of itself revoke the licence of 1887, when and under what circumstances was revocation to take place? The by-law is silent on the point. There are only two alternatives. Either the power of revocation remained in the hands of the council, or it passed to Viau and his associates. It certainly was not given to them expressly. Was it given to them by necessary implication? Even assuming that the licence of 1887 was to continue unrevoked, By-law No. 61 was anything but a prudent or business-like arrangement. Viau was not a man of substance. He had not the control of any water-power. He had no one at his back. Apparently he was without any means of carrying his scheme into effect except what he could get by pledging the concession. For the concession itself he paid nothing. By accepting it he came under no obligation to do anything of any sort or kind. He gave no security to the council. He was not bound to supply electric light to the city or to those of the inhabitants who might require it. Nor was he placed under any restriction as to the amount of the charges which he and his associates might make. He and they were left at liberty to charge as much as they pleased or as much as they could get, and they were left at liberty to grant or withhold the supply at their pleasure. In these circumstances, the claim of the appellant company that no other person or body of persons shall supply electric lighting to the city during the period of their

concession is not one that commends itself to favourable consideration. . It seems to their Lordships that it would have been an act of incredible folly on the part of the council to give Viau and his associates the right to terminate the licence of the Ottawa Company at their will and pleasure. Unless the by-law admitted of no other construction, their Lordships would certainly hesitate to come to the conclusion that the council of the city of Hull had so utterly neglected their duty. Their Lordships, however, agree with the Court of Queen's Bench in thinking that the by-law admits of a more reasonable construction. Their Lordships think that the real meaning of the transaction was this: The city of Hull granted to Viau an exclusive right of establishing a system of electric lighting for a certain term of years—that is to say, by their grant to him they bound themselves during that period not to grant such a right to anybody else; but at the same time they said to Viau, "You must remember that we have granted permission to the Ottawa Company to establish a system of electric lighting in the city of Hull, and that system is now in operation—we bind ourselves not to convert that permission into a right, but we do not bind ourselves to revoke that permission at your bidding. We keep the power of revocation in our own hands." Possibly the consideration that the Ottawa Company was to be left to carry on its operations in Hull until the council saw fit to revoke its licence may account for the singular fact that in passing By-law No. 61 the council did not think it necessary either to impose on Viau and his associates any obligation to furnish a supply of electric light to the municipality or to those of the inhabitants who might require it, or to place any restriction upon the charges which Viau and his associates might demand.

In the result, therefore, their Lordships agree in substance with the second ground of the decision of the Court of Queen's Bench, and they will humbly advise His Majesty that this appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Norton, Rose, Norton & Co.*
Solicitors for both respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

J. C.* 1902 Feb. 12.

NELSON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY OF THE ISLE OF MAN.

Conviction set aside—No evidence of Fraudulent Appropriation—Liability of Bank Director.

Conviction of fraudulently appropriating the moneys of a bank set aside, it appearing that there was no evidence of the convict director, who had overdrawn on a so-called trust account irregularly opened in his name, having misappropriated any one draft to his own use in fraud (within the meaning of the Act) of the bank's right to have the money.

APPEAL from a conviction by the above Court (Nov. 19, 1900) on an indictment charging the appellant with unlawfully and fraudulently taking and applying to his own use and benefit moneys and securities belonging to the Dumbell's Banking Company, Limited, of which he was a director, and against the sentence of five years' penal servitude passed upon such conviction by the said Court. That charge was made under s. 218 of a statute of the Isle of Man Legislature, which section is as follows:—

"Whosoever being a director member or public officer of any body corporate or public company shall fraudulently take or apply for his own use or benefit or for any use or purposes other than the use or purposes of such body corporate or public company any of the property of such body corporate or public company shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the Court to any of the punishments which the Court may award as hereinbefore last mentioned."

The charge related to sums drawn upon an account called

* *Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and LORD LINDLEY.

the "C. B. Nelson Trust Account" between April 5, 1887, and August 7, 1892. It appeared that the cheques were openly drawn at the head office at Douglas upon this account. The account was open to inspection of the bank officials, and was returned amongst other accounts, weekly or monthly, to the head office in Douglas; and in the returns the name of the account and its total amount of indebtedness were set forth.

The overdraft on this account was for the purpose of the purchase of Allsopp's Brewery shares; and on each occasion of the resale of these shares the amount was placed to the credit of the account, and up to December, 1892, moneys were paid into and out of this account.

The appellant at the trial put in, and proved, a statement shewing his financial position on December 31, 1893 (more than sixteen months after the drawing of the last cheque set out in the indictment upon which he was convicted), by which it appears that at that time the appellant's assets exceeded his total liabilities by the sum of 19,123*l.*

Thereupon Deemster Shee remarked, "I don't see the materiality of all this. It does not matter what wealth a man has if he illegally uses the money of the bank." In summing up he said: "Nelson made a strong point: how could he have been fraudulent when he took these overdrafts; he was solvent. If the jury thought it a satisfactory answer that it was not fraudulent it was their duty to say so, and he was entitled to a verdict of 'Not guilty.' But that was a dangerous doctrine. Supposing these securities had been deposited with the bank the argument would have been stronger. It was a dangerous doctrine to allow one director to do what another director could not; even though he thought himself solvent though he was not."

The jury, after being absent for six hours, informed the Court they were divided and unable to come to a verdict. The foreman said, "We differ on what in this case constitutes fraud within the meaning of the law. Some of the jurors are of opinion the defendants were solvent at the time of incurring the liabilities, and therefore not guilty of fraud." Deemster Shee thereupon said, "Is that the only difficulty you have?"

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and the foreman replied, "I think so, practically." Whereupon the Deemster gave the following ruling:—

Deemster Shee: "Well, solvency alone would not be sufficient evidence they were not guilty. It might be a matter for you to consider, but in my opinion solvency alone would not be evidence they were not guilty of fraud. It is an element for you to consider whether there was fraud. You have to consider the whole of the circumstances in the case: the date of the account; the fact that there were other overdrafts of the defendants; the size of the overdrafts; the way in which they were kept; and the account the prisoners have given of how they embarked in these transactions. All the circumstances in the case have to be taken into your consideration. To say, simply because one of the defendants was solvent, that therefore he could not be guilty of fraud would not be right. You must consider about the circumstances; and, considering the importance of the case, I should advise his Excellency to ask you to retire to consider your verdict again."

Finally a verdict was returned, "Guilty on the Nelson Trust Account only," with a recommendation to mercy.

Lawson Walton, K.C., and *Muir Mackenzie*, for the appellant, contended that there was no evidence that in obtaining the overdraft in question he had any fraudulent intention. It was obtained in the same manner as his overdraft on his private account, in reference to which he had not been indicted. The prosecution was in fact a substitution for civil proceedings. On an analysis of the account it appeared that the 1594*l.* comprised in the first six counts drawn in April, 1887, was repaid by June, 1887, by credit payments amounting to 3899*l.*, and that on the 30th June, allowing for further debits, the overdraft was reduced to 373*l.* Similarly as regards the amounts comprised in seventh to tenth counts and drawn out in July and August, 1887, they were materially reduced by large credit payments during the second half of 1887 and the first half of 1888. The purchases of Allsopp's shares were effected on a joint account on behalf of the appellant and two other solvent co-adventurers. The evidence established that the

appellant, at the time of borrowing the sums mentioned in the indictment, was solvent and able to repay. At the trial he was seriously prejudiced by the misdirection of the Deemster, indicating as it did a misapprehension of the legal nature of the charge and a confusion between the civil and criminal liabilities of a director. The case was allowed to go to the jury in view of the total absence of evidence of either concealment or intention to defraud, or of knowledge on the appellant's part of inability to repay what he had borrowed. No evidence can be referred to as shewing that any one of the drafts making up the overdraft had been fraudulently obtained; or that the appellant had any reason to believe at the time he obtained them that he could not repay, or that he did not intend to repay, them.

Ring (*Attorney-General for the Isle of Man*), and *C. W. Matthews*, for the respondent, contended that there was ample evidence, and it was not denied by the appellant, that he had taken the sums of money comprised in the indictment and applied them to his own use and profit. The question whether he took them and applied them fraudulently was essentially one for the jury on the evidence placed before them, including that of the appellant, and therefore their finding should not be disturbed. The whole of the facts were left to the jury, and they were directed to consider whether the taking was fraudulent or otherwise; and as a proof that the jury followed this direction and properly applied their minds to the case, it was pointed out that they convicted on ten counts and acquitted on sixteen. The evidence of fraudulent taking consisted of these facts: first, the amounts were withdrawn by the appellant without depositing any security until as late as August, 1899, when he gave a charge upon his property, without the consent or knowledge of any of the other directors, and in contravention of the articles of association, Nos. 6 and 89 (9), which provided for the consent in writing of the board and deprived the appellant of any vote in reference to this transaction, and there was no entry in the minute book of the bank in relation to the said account. The account was wrongly described as a trust account when it was in no sense an account connected

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with any trust. It was opened for the purely speculative purposes of the three persons immediately concerned, namely, a speculation in Allsopp's shares in which the bank had no interest. The names of the two latter persons were suppressed in the bank books. All the cheques drawn on the account were signed by the appellant at the head office in Douglas, where the bank books were audited. But the account itself was kept at a branch in Ramsey, where there was no audit. The appellant's counsel at the trial did not object that there was no case to go to the jury, and confined himself to the contention that there was no sufficient evidence of fraudulent intention at the date of the different operations on the account. The Deemster's summing-up left this issue to the jury without any objection from the appellant's counsel.

Mackenzie replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This was a charge against the defendant of having fraudulently appropriated to his own use money of the Dumbell's Banking Company. Their Lordships are of opinion that there was no sufficient legal evidence against the defendant of that offence, and under those circumstances their Lordships will recommend that this part of the conviction, the only one on which leave to appeal has been given, should be set aside.

It is impossible not to notice that the mode in which the question has been propounded from time to time, both by counsel and, one regrets to say, also by the learned Deemster himself who presided, confuses what is the nature of the charge made with the general charge of irregularity in the conduct of the proceedings of the bank. That is not the criminal charge which was preferred by the indictment, and which ought to have been found by the jury. The charge was of fraudulently appropriating money of the bank.

The facts sufficiently shew that for a period of some years, beginning at all events as early as 1887, and going down to 1893, the person convicted was in the habit of drawing partly upon his own private account and partly on an account which

was called a trust account, but still in his name, and that from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a bank is treated. Money was paid in and money was paid out, at one time a very large overdraft, and at another time that overdraft reduced to an amount of something like 300*l.* or 400*l.*, down to the period of two or three years after the trust account had first begun. Then it is suggested that after a period of six years altogether has elapsed it is possible to pick out some of the earlier drafts that have been made under the circumstances, and treat a particular draft as having been itself an offence—that is to say, a misappropriation of the money of the bank to the use and purposes of the person who drew it. The real truth is that, if what is suggested as the offence had been committed, every cheque was itself a theft. I use the phrase compendiously, because, although it is not stealing in the language of the statute, the elements of stealing must exist in it, and, in order to determine whether this offence has been committed in the sense which the law requires in order to sustain the conviction, one must see whether it is true to say that every one of those cheques so drawn, and the money obtained by reason thereof, was a theft.

Their Lordships are of opinion that there was no legal evidence of any such proposition. It may have been extremely irregular, and may have been wrong, and was wrong under the circumstances, of this bank to allow the account to have been entered into at all. The board ought to have been consulted, and the board ought to have given its consent in writing that such an account should be entered into, or at all events that overdrafts should not have been allowed on it; but that each of these transactions which is made the subject of indictment was practically a stealing of the money obtained by the cheque there appears to be no evidence whatever, and their Lordships are unable to see that the question was ever properly before the jury at all. It was a natural and proper inquiry by the jury which they made of the learned Deemster, whether or not they ought to have some guidance as to what was a fraud within the meaning of the law, because, as they explained,

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they were anxious to learn. Some of them thought there could be no fraud at the time, because the person was solvent who was drawing these cheques, to which inquiry no answer apparently was given by the learned Deemster in the language which the jury required, but he goes on to say that it is not conclusive that the defendant was not guilty because he was solvent—an entire inversion, their Lordships regret to observe, of what ought to have been told the jury at the time. Strictly, and as a matter of verbal accuracy, indeed it is not conclusive that the person was not guilty; but the question which the jurymen obviously desired to have answered was whether or not, given the circumstances of this case, the man being perfectly solvent at the time and having ample assets to answer the cheque which he was drawing, they ought to infer from the nature of the transaction that it was a taking or misappropriation within the meaning of the statute. Upon that it is impossible to say the jury received any guidance whatever.

In the result their Lordships are of opinion that there may have been ample evidence that the account was improperly obtained, and it may have been in one sense fraudulently obtained, but there is no evidence justifying the charge that this money was appropriated to the use of the person who drew the cheque in fraud of the right of the bank to have the money, and therefore that the offence contemplated by the statute was committed, or at all events there was no evidence of its being committed so as to justify the verdict of "guilty." For these reasons their Lordships will humbly advise His Majesty that the conviction of November 19, 1900, should be set aside.

There will be no order as to costs against the Crown.

Solicitors for appellant: *Hores, Pattisson & Bathurst.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

CHAN KIT SAN AND ANOTHER . . . . DEFENDANTS;

AND

HO FUNG HANG . . . . . PLAINTIFF.

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Feb. 19, 22;
March 12.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong Ordinances No. 13 *of* 1864, *s.* 8; *No.* 8 *of* 1860, *s.* 39; *and No.* 9 *of* 1870, *s.* 1—*Construction—Limitation—Cause of Action—Grant of Letters of Administration—Powers of Registrar.*

Held, in a suit for a partnership account brought by the administrator of a deceased partner, that the Statute of Limitations (Hong Kong Ordinance No. 13 of 1864, s. 8) ran from the grant of letters in 1897, and not from the grant of probate in 1886 of a forged will, which on revocation was void ab initio.

By the true construction of s. 39 of Ordinances No. 8 of 1860, and No. 9 of 1870, s. 1, the registrar of the Court was merely placed in the position of a receiver of the intestate's estate pending the grant of letters, but without power to sue in respect thereof.

APPEAL from a decree of the Supreme Court (March 14, 1900) affirming a decree of the Acting Chief Justice (Dec. 21, 1899).

The question decided was whether the respondent's suit for a partnership account against the appellants was barred by limitation. He sued on January 13, 1899, under letters of administration granted in 1897 to the estate of Ho I. Shek, who died in 1880.

Sect. 8 of Hong Kong Ordinance No. 13 of 1864 provides as follows: "All actions of account or for not accounting and suits for such accounts as concern the trade of merchandise between merchant and merchant their factors or servants shall be commenced and sued within six years after the cause of such actions or suits; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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same account having arisen within six years next before the commencement of such action or suit."

Both Courts below held that the statute did not begin to run until the grant of letters in 1897, on the ground that until such time there was no person to whom a right of action had accrued.

Upjohn, K.C., and *Clayton*, for the appellants, contended that the Ordinance ran from the death of the deceased, when a right of action in respect of his partnership dealings at once accrued to the registrar under s. 39 of Ordinance No. 8 of 1860, and s. 1 of No. 9 of 1870, the estate of the deceased having vested in him under the earlier Ordinance, and the later having declared him to be ex-officio official administrator. That was sufficient to enable him to sue, and the later Ordinance by ss. 4 and 7 imposed upon him the duty of exercising the rights of property vested in him for the protection of the estate. Alternatively the Ordinance ran from November, 1886, when probate of an alleged will of the deceased was granted to Ho Chik Fuk. No doubt in November, 1896, that probate was revoked on the ground of the will being forged. But for ten years the grantee represented the estate, could give valid discharges, and could have sued. Not having done so, he and all other representatives of the deceased were barred. Reference was made to *Murray* v. *East India Co.* (1); Darby and Bosanquet's Limitation, 2nd ed. pp. 47 and 48; *Allen* v. *Dundas.* (2)

Morton W. Smith, for the respondent, contended that the grant of probate must be treated as a nullity. As a matter of fact the grantee did not act under it in any way in reference to the partnership. On revocation the estate and its representation and causes of action in respect of it must be treated as if no probate had ever been granted. With regard to the registrar's title to sue, that depends on the two Ordinances—it is claimed as incident to his official administratorship. But that did not clothe him with complete representation nor give him a title to sue. The vesting clause was merely for safe

(1) (1821) 5 B. & Ald. 204, 214; 24 R. R. 325.

(2) (1789) 3 T. R. 125; 1 R. R. 666.

custody of those things which require it before letters are obtained. The registrar is not even given a right to apply for them. There is nothing in the section referred to which interferes with the well-established principle that before a suit can be brought on behalf of a deceased's estate there must be a duly constituted officer empowered to bring it: see *In re Ivory* (1); *Partington* v. *Hawthorne*. (2)

Upjohn, K.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. In this case the respondent, as administrator of the estate and effects of Ho I. Shek, deceased, on January 13, 1899, commenced an action in the Supreme Court of Hong Kong against the appellants for an account of certain alleged partnership transactions between the deceased and the appellants. The appellants (defendants in the action) pleaded the Statute of Limitations. An order was made on December 1, 1899, that the issue of law with regard to the Statute of Limitations be tried before any other issues in the suit. The terms of the issue were—"Assuming that all the facts stated in the petition are true, is or is not the plaintiff's claim herein barred by the Statute of Limitations?"

The material facts and dates thus admitted for the purpose of argument are the following:—

(1.) Ho I. Shek died intestate on June 19, 1880.

(2.) No administration to his estate was taken out until the month of November, 1886, when probate of an alleged will was granted by the Supreme Court in its probate jurisdiction to Ho Chik Fuk, the person named as executor in such alleged will; but Ho Chik Fuk did not intermeddle with the shares claimed in the alleged partnership transactions.

(3.) On November 17, 1896, the alleged will was declared to be a forgery, and the probate was revoked.

(4.) On June 21, 1897, administration was granted to the respondent. The relevant Statute of Limitations is contained in s. 8 of Ordinance No. 13, 1864, whereby it was enacted that all actions of account must be commenced within six years

(1) (1878) 10 Ch. D. 374. (2) (1888) 52 J. P. 807.

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after the cause of such actions. These are the same words as those of 21 Jac. 1, c. 16.

It was not seriously, and could not be successfully, disputed that, according to the well-established rule in English law, the statute runs against an intestate's estate from the date of the grant of letters of administration only. But the appellants contended (1.) that, according to the law of the Colony, a right of action accrued on the intestate's death to the registrar of the Court, and the statute therefore ran from that date; or, alternatively, (2.) that the statute commenced to run from November, 1886, when the grant of probate of the forged will was made to Ho Chik Fuk.

On the trial of the issue the Supreme Court (Original Jurisdiction) decided in favour of the respondent, and its decision was affirmed by the Supreme Court (Appellate Jurisdiction). The present appeal is from the order of the latter Court dated March 14, 1900.

The argument of the present appellants in the First Court was based chiefly on the grant of the probate of the forged will. Now, it is quite true that so long as that probate was in existence the title of the grantee could not be impeached in any Common Law Court, and he could have sued for and given a good discharge for any debt due to the deceased. It is indeed questionable whether in the present case the alleged executor could have maintained an action against the present appellants, because the title of an executor is derived not from the probate but from the will, and the probate when granted relates back to the death. As more than six years had elapsed between the date of the death and the grant of the probate, any right of action by Ho Chik Fuk under his probate would (it is said) have been barred. The Acting Chief Justice decided in the respondent's favour on this ground. It is replied by counsel at their Lordships' bar that the cause of action vested though the right to sue was barred. Without giving any opinion on this somewhat subtle point, their Lordships think that the general argument may be disposed of on a broader ground. By the revocation the grant of probate was made void ab initio, for there was not in fact any will to be proved.

It is now known that the apparent title of the so-called executor, although it could not be impeached in any Court except the Court of Probate, was founded on a fiction and a fraud, and for the purposes of the present argument the probate must be treated as a nullity and as never having had any real existence. The Court cannot be bound to take notice when the facts are known of an apparent right of action obtained by fraud.

In the Court of Appeal no reliance appears to have been placed on this point, though it has been resuscitated before their Lordships. The point there argued was the first contention of the appellants that a right of action vested in the registrar on the death of the intestate. This depends on certain sections of the Ordinances. By s. 39 of Ordinance No. 8 of 1860, which was the one then in force, it was enacted that from and after the decease of any person dying intestate, and until letters of administration should be granted in respect of his estate and effects, the personal estate and effects of such person should be vested in the registrar of the Supreme Court. By s. 1 of Ordinance No. 9 of 1870 it was declared that the registrar of the Supreme Court was ex-officio official administrator under Ordinance No. 8 of 1860. And by following sections large powers were given to the official administrator for the purpose of enabling him to get in and protect the estate of the deceased, pending the grant of letters of administration; but no power to sue was conferred on him. It was argued that by these Ordinances all the rights of action included in the estate of the deceased were vested in the registrar or official administrator, and he therefore had, by implication, a statutory right to enforce them by action. But their Lordships think that there is nothing in the sections to which they have been referred to overrule the established rule of law that no action can be maintained in respect of the estate of a deceased person except by a duly constituted administrator or executor. The sections referred to seem to place the registrar, pending the grant of letters of administration, in the position of a receiver, and to give him powers incident to such an office, but nothing more. And the result of the inquiry made

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by the Chief Justice as to the practice under s. 39 of the Ordinance of 1860 confirms this view.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed, and the appellants will pay the costs of it.

Solicitors for appellants: *Harston & Bennett.*
Solicitors for respondent: *Trass & Enever.*

[HOUSE OF LORDS.]

THE LAW UNION AND CROWN INSURANCE COMPANY . . . . } APPELLANTS; H. L. (E.) 1902 April 22.

AND

HILL AND ANOTHER . . . . . RESPONDENTS.

Will—Construction—Limitations of Real Estates—Shifting Clause—Successive Life Estates—Exception of Eldest Son "entitled" to other Estates.

A testator in 1855 devised his real estates to the use of all and every the sons of his nephew Richard successively, for their respective lives, "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits" of the C. estates "after the decease of Richard as tenant for life or any greater estate or interest whatsoever."

In 1869 Richard and his eldest son, being then respectively tenant for life and tenant in tail in remainder of the C. estates, executed deeds under which those estates were disentailed and sold and the proceeds invested by trustees upon trusts under which the son took a beneficial interest. In 1875 the testator died. In 1899 Richard died:—

Held, that Richard's eldest son was not at his father's death "entitled" to the rents, &c., of the C. estates within the meaning of the exception clause, and was therefore not excluded from the succession to the testator's estates.

The decision of the Court of Appeal, *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, affirmed.

E. GRIMSHAW by will dated in 1855 devised (in the events which happened) his real estates in Lancashire to the use of his nephew Richard Atkinson during his life and after his decease to the use of all and every the son and sons of Richard Atkinson then living and who should be born in the testator's lifetime or in due time after ("other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits" of certain estates at Cockerham "after the decease of Richard Atkinson as tenant for life or any greater estate or interest whatsoever") severally and successively in remainder one after another.

In 1869 Richard Atkinson, tenant for life, and his eldest son Richard Norton, tenant in tail in remainder of the Cockerham

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estates, joined in executing deeds under which the estates were disentailed and sold and the proceeds received by trustees upon trusts under which Richard Norton took benefits. In 1875 the testator died. In 1899 Richard Atkinson died, leaving Richard Norton and another son, Ernest, him surviving.

Upon a summons taken out in the administration suit of *Shuttleworth* v. *Murray* (1), Cozens-Hardy J. held that at his father's death Richard Norton was excluded by the exception clause from succeeding to the testator's Lancashire estates, and that his brother Ernest became entitled to them. (2) The Court of Appeal (Rigby, Vaughan Williams, and Stirling L.JJ.) reversed this decision, holding that on his father's death Richard Norton was not excluded, and that the present respondents as assignees of Richard Norton's life estate became entitled to the testator's Lancashire estates. (1) Against this decision the present appeal was brought by incumbrancers interested in the succession of Ernest.

Levett, K.C., and *Vernon Smith, K.C.* (*E. S. Ford* with them), for the appellants. At the date of the will Richard Norton was within the exception clause as the eldest son for the time being and entitled upon his father's death to the Cockerham estates. Once entitled, he did not cease to be entitled when the estates were sold and the proceeds held by trustees. "Entitled" must be construed as meaning entitled under the settlement of the Cockerham estates. So construed, a man does not become less entitled because he sells the estates before they fall into possession. The gift is to a class, the time for ascertaining the class being the death of Richard Atkinson. Rigby L.J. was influenced by a mistake of fact: his Lordship supposed that Richard Norton had disentailed the estates before the date of the will. The words "eldest or only son for the time being" designate Richard Norton, and the testator manifestly had the intention that Richard Norton, if he got the benefit of the Cockerham property, should not also succeed to the testator's Lancashire estates. Similar words received the construction now con-

(1) [1901] 1 Ch. 819. (2) [1900] 1 Ch. 795.

tended for in *Collingwood* v. *Stanhope* (1), where Lord Westbury said that "an eldest or only son for the time being entitled" means an eldest or only son who is for the time being entitled or who has become entitled.

[They also discussed the cases cited in the Court of Appeal.]

Haldane, K.C. (*Hon. E. C. Macnaghten, K.C.*, and *Hon. T. H. Watson* with him), for the respondents.

EARL OF HALSBURY L.C. My Lords, I am extremely glad that we have not in dealing with this will to consider anything about artificial rules. There is no question here as to what has been called "the paramount intention" or "the truth and honour of the settlement." I do not for my own part care about the expressions "paramount intention" and "the truth and honour of the settlement," or words of that character. To my mind, I confess, those expressions are not much more definite than a good many other propositions with regard to the construction of documents. As I have said, the rule is to adhere to the language and meaning of the instrument, remembering throughout that in adhering to the language you must take the full instrument as written. So far as taking any particular statement or any one passage is concerned, if you can infer anything reasonable from that statement itself, then you ought to do so, and if you can you may compare that reasonable inference with what seems to be manifestly apparent in other parts of the instrument. I have to ask myself here whether, when for the first time this instrument became operative, there was any person who could be ascertained to be within this exception. I have not succeeded in doing so; I cannot find any such person. There was no person who was then "entitled" to the possession of the estates in question. I do not want to read the whole of the words; I think the meaning of them is manifest. I quite agree with Mr. Haldane that this is a very short point, namely, whether there was anybody who filled that position at that time, and I think there was not. Under these circumstances it appears to me that the plain and proper construction of this language must

(1) (1869) L. R. 4 H. L. 43, 58, 59.

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be simply what it says, and that the judgment of the Court of Appeal was right, and that this appeal must be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I do not desire to say anything.

LORD SHAND. My Lords, I also am of the same opinion.

LORD DAVEY. My Lords, I am of the same opinion, and the reasons for my opinion are expressed in Rigby L.J.'s judgment. I ought to observe that the errors as to dates into which that learned judge was led are corrected in the revised judgment in the *Law Reports*, and do not in any way affect his judgment.

With regard to the case that was relied on by Cozens-Hardy J., this is the only observation I desire to make: in *Collingwood* v. *Stanhope* (1) in this House it appears from the report that Lord Hatherley, Lord Westbury and Lord Cairns all pointed out that that was one of the class of cases where there had been a family settlement in which provision was made for portions for the younger children, and the eldest son took the estate. Therefore it came within that class of cases in which the principle is applied of considering what is the overriding or paramount intention—or whatever expression you choose to use—to put it more clearly perhaps, the intention that is to be collected from the whole instrument, and that is that provision is to be made for the children generally. According to the English mode of making settlements of that kind, the eldest son takes the estate and the younger children have portions provided for them, and no child who takes the estate should encroach upon the portions of the other children, but if the eldest son does not take the estate he is entitled to have a portion provided for him. All the observations to which Cozens-Hardy J. referred in the passages he quoted must, it appears to me, be read with reference to the case which the noble and learned Lords then had before them, which was a

(1) L. R. 4 H. L. 43.

case of that description. If I may say so with respect, Cozens-Hardy J. appears to have fallen into the converse error to that which Lord Hatherley acknowledged he had fallen into, namely, applying the rule by which a portion is given to an eldest son who does not take the estate to a case to which it does not apply—overlooking the principle on which it is founded; while Cozens-Hardy J., on the other hand, has applied the rule against double portions to a case to which it does not apply. Here the settlor was not in loco parentis.

My Lords, I think the words of this exception must be construed literally—I mean according to the plain use of language; and, so construing them, I cannot doubt that the right meaning has been put upon them by the Court of Appeal. I think it is not unworthy of observation that the will only came into operation in the year 1875, and neither at that time nor ever for one moment since that time has any son of Richard Atkinson been entitled in any sense whatever to a scintilla of interest in the Cockerham estates. It could not be predicated that any son of Richard Atkinson was "entitled to the possession or to the receipt of the rents, issues, and profits" of those estates when, according to the terms of the will, the succession opened upon the death of Richard Atkinson. Since the will became a living instrument no son of Richard Atkinson filled that description. I therefore agree that the appeal should be dismissed.

LORD BRAMPTON. My Lords, I concur.

LORD ROBERTSON. My Lords, I also concur.

LORD LINDLEY. My Lords, I am of the same opinion. I think the whole difficulty turns on the use of the word "entitled"; and if you ask "When entitled?" the difficulty vanishes. When the succession opened, i.e., on the death of Richard Atkinson, the devisee under the will of the testator was not "entitled" to the Cockerham estate; and it is only by introducing a theory to the effect that the testator could not have intended the two estates to be possessed by the same

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person even at different times that any question arises. A reference to this source of error is to be found in the judgment of Stirling L.J., where his Lordship says: "So far as appears by the will it seems to me that the testator simply considered that a son who was in actual enjoyment of the Cockerham estates would not in any way require his bounty." I think the language is plain, and it ought not to be modified so as to make it fit any theory.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 22, 1902.

Solicitors: *Robins, Hay, Waters & Hay; R. B. Dods.*

[HOUSE OF LORDS.]

H. L. (I.) 1902 *May* 1.

THE QUEEN (AT THE PROSECUTION OF THE COUNTY COUNCIL OF KILDARE) . } APPELLANTS;

AND

BARTON, AND THE GREAT SOUTHERN AND WESTERN RAILWAY COMPANY OF IRELAND . . . . . } RESPONDENTS.

Practice—Appeal—Jurisdiction—Appeal to House of Lords from Order of Court of Appeal in Ireland—Certiorari—Appellate Jurisdiction Act, 1876 (*c.* 59), *ss.* 3, 12—*Supreme Court of Judicature Act* (*Ireland*), 1877 (*c.* 57), *s.* 86.

No appeal lies to the House of Lords from an order of the Court of Appeal in Ireland with respect to the issue of a writ of certiorari.

IN 1899 the respondent Barton, Commissioner of Valuation, made a revised valuation of the Great Southern and Western Railway Company of Ireland. The Kildare County Council having applied for a writ of certiorari to quash the valuation, the Queen's Bench Division (Crown Side), Ireland, made an

order absolute for the writ to issue to remove into the Queen's Bench Division and quash the revised valuation and other matters consequent thereupon. The Court of Appeal in Ireland discharged this order on the ground that the Kildare County Council were by their conduct estopped from raising the question. (1) The county council having appealed to this House, a preliminary objection to the competency of the appeal was taken by

Ronan, K.C. (of the Irish Bar), (*D. G. Chaytor* with him), for the Great Southern and Western Railway Company of Ireland, respondents. This appeal is incompetent. By the Appellate Jurisdiction Act, 1876, s. 12, "Except in so far as may be authorized by orders of the House of Lords an appeal shall not lie to the House of Lords from any Court in . . . . Ireland in any case which, according to the law or practice hitherto in use, could not have been reviewed by that House, either in error or on appeal." The effect of s. 86 of the Irish Judicature Act, 1877, is that no appeal can be brought from the Court of Appeal in Ireland in any case where before that Act an appeal would not have lain from the Exchequer Chamber in Ireland. In substance these Acts gave an appeal to the House of Lords from Ireland only where it previously existed. In certiorari it did not exist. The decision of the Queen's Bench on certiorari could not before those Acts be reviewed in the Exchequer Chamber, and consequently not in the House of Lords. Error lay only upon record. The procedure in certiorari and mandamus was similar, and apart from statute no error lay in mandamus. In England 6 & 7 Vict. c. 67 gave a writ of error in mandamus in certain cases. In Ireland 9 & 10 Vict. c. 113 was to the same effect. There never has been any similar legislation as to certiorari which was left without pleadings or power to demur, and therefore without power to bring error. The decision in *Lord Gosford* v. *Irish Land Commission* (2) is conclusive as to the present case. The question does not depend on whether the order was final or interlocutory, but on whether error would have lain. [He also

(1) [1901] 2 I. R. 215.

(2) [1899] A. C. 435.

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referred to *Reg.* v. *Saddlers' Co.* (1); and see *Dean and Chapter of Dublin* v. *Rex* (2); Tapping on Mandamus, pp. 7, 8; English Crown Office Rules, 1886, r. 37 (certiorari), and rule 67 (mandamus), and the corresponding Irish Crown Office Rules, 1891, r. 34 (certiorari), and rule 56 (mandamus); Irish Judicature Act, 1877, s. 50.]

J. H. Campbell, S.-G. (Ireland), and *Vesey FitzGerald* (of the Irish Bar), for Barton, respondent.

Balfour Browne, K.C. (*J. B. Falconer, K.C.* (of the Irish Bar), and *Sylvain Mayer* with him), for the appellants. The *Gosford Case* (3) turned upon the fact that the order was an interlocutory one. Here it is in its nature final, determining the question for all time with regard to that particular valuation. This is one of "the like orders" in respect of which the right of appeal is preserved by s. 86 of the Act of 1877.

EARL OF HALSBURY L.C. My Lords, I do not know that one need say any more about the case than this; it seems to me that, having regard to the express language of the Act of Parliament, the whole of the matter which has been argued before us is concluded by the decision of this House in *Lord Gosford's Case.* (3) To my mind there is very little doubt about what the intention of the Legislature was in using the language that it has used in the 86th section of the Irish Judicature Act. Of course it is always possible when you talk about "the like order" to suggest that there was some kind of similarity between the order spoken of and the orders which existed before the passing of the Irish Judicature Act; but to my mind the manifest intention was—it might perhaps have been better expressed—that in future there should be no appeal to the House of Lords in cases in which up to that time and under the then practice there was no appeal. Whether the words were felicitously selected or not, to my mind it is beyond all doubt that that was the intention and meaning of the Legislature; and therefore we must adhere to the decision which was arrived at in *Lord Gosford's Case* (3), and hold that

(1) (1863) 10 H. L. C. at p. 424; 32 L. J. (N.S.) (Q.B.) at p. 344.
(2) (1724) 1 Bro. P. C. 73.
(3) [1899] A. C. 435.

there is no appeal to this House from the order which has been made in this case. H. L. (I.) 1902 REG. v. BARTON.

Appeal dismissed as incompetent with costs.

Lords' Journals, May 1, 1902.

Solicitors: *Francis & Johnson, for W. G. White, Dublin; Young, Jackson, Beard & King, for Sir Patrick Coll C.B., Chief Crown Solicitor, Dublin, and for Barrington & Son, Dublin.*

[HOUSE OF LORDS.]

WILLIS AND OTHERS . . . . . APPELLANTS; H. L. (E.) 1902 *May* 13.

AND

BARRON AND OTHERS . . . . . RESPONDENTS.

Solicitor and Client—Confidential Relation—Mistake—Rectification of Deed—Benefit conferred by Client on near Relative of Solicitor—Duty of Solicitor—Independent Advice.

A solicitor, who was a trustee for a married woman under a settlement and also her husband's solicitor, prepared a deed by which she conferred a benefit on a son of the solicitor and renounced rights she had under the settlement. After hearing the solicitor's explanation of the deed she executed it:—

Held, that she was not bound by the deed, on the ground that the real effect of it on her rights and position was not in fact explained to her, and also on the ground that it was the duty of the solicitor to take care that she did not execute the deed without having independent advice.

The decision of the Court of Appeal, [1900] 2 Ch. 121, affirmed.

BY a deed of December, 1890, to which (among others) Joseph Willis, his wife, and William Moore Skinner were parties, property was settled in trust (inter alia) for Joseph Willis for life, and after his death for his wife for life; in default of issue (which happened) a general power of appointment was given to Joseph Willis and his wife jointly, and subject thereto a general power of appointment was given to the survivor, and subject thereto the property was settled in

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trust as to one-half for Frederick Herbert Skinner, a son of William Moore Skinner, absolutely.

By a deed of October, 1891, to which Joseph Willis and his wife were parties, the trusts of the deed of 1890 were varied by a clause that the provision in the deed of 1890 for the benefit of the wife should be construed as a provision for her benefit so long only as she should remain the widow of Joseph Willis: also by the same deed Joseph Willis and his wife in exercise of their joint power of appointment appointed that the trust funds should be held as Joseph Willis alone should appoint, and in default of appointment then (excluding the power of appointment by the widow of Joseph Willis) upon the trusts declared by the deed of 1890—that is to say, as to one-half in trust for F. H. Skinner.

Joseph Willis died in 1893 without having exercised his sole power of appointment. By a deed in 1894, to which (among others) his widow and W. M. Skinner and F. H. Skinner were parties, it was declared that the income of the trust funds should be paid to the widow of Joseph Willis during her life in the same manner as if the first modification clause had not been inserted in the deed of 1891, and that in all other respects the deeds of 1890 and 1891 should be confirmed.

The deeds of 1890, 1891 and 1894 were all prepared by W. M. Skinner, a solicitor, and one of the trustees under the deed of 1890. The circumstances under which Mrs. Joseph Willis executed the deed of 1891, and the information and advice which she received from W. M. Skinner, and the relation in which he stood to her, are fully discussed in their Lordships' judgments. In 1897 she married the respondent Barron, and afterwards brought an action against the trustees of the deed of 1890 claiming a declaration and a rectification of the deeds of 1891 and 1894. Cozens-Hardy J., taking one view of the facts, dismissed the action. (1) The Court of Appeal (Lindley M.R. and Rigby and Collins L.JJ.), taking another view, reversed that decision, and made an order declaring that the deed of 1891 was not binding on the plaintiff so far as it purported to deprive her of the general power of appointment

(1) [1899] 2 Ch. 578.

given to her by the deed of 1890; and declaring that the deed of 1894 was not binding on her so far as it confirmed the deed of 1891. (1) Against this decision the trustees brought the present appeal, which, as will be seen, turned upon the view which their Lordships took of what passed between Mrs. Joseph Willis and W. M. Skinner in 1891.

May 12, 13. *Warmington, K.C.*, and *P. S. Stokes*, for the appellants.

Hughes, K.C., and *Ashton Cross*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, I have not the least doubt that this judgment ought to be affirmed, and I confess I am a little surprised that the learned judge who heard the case originally entertained a different view, and I think I should have treated the matter very summarily but for the learned judge having entertained that view.

My Lords, it seems to me that there are one or two grounds upon which the deed which it is sought to set aside by this proceeding might be impeached. I am by no means certain that, if the whole question had arisen in a Court of law upon this state of the evidence, I should not as a juryman have found upon an issue of non est factum that it was not her deed at all. It seems to me that she was in a position in which it was impossible to suppose that any lady under the circumstances of this case could form a judgment of her own as to what was the effect of these settlements. And when she was told that it was for the purpose of rectifying a mistake which had been made in the deed of 1890, it seems to me that that was an untrue statement—whether consciously or unconsciously made I will not say; but, at all events, it was not true. There was no mistake made in the deed. The deed was executed with unusual and extraordinary care. The discussions about it extended over months; corrections were made from time to time in the draft deed by the parties to it; and not until the parties began to think what different events might occur, so

(1) [1900] 2 Ch. 121.

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that the property would be held in a way which according to their then view would be unjust, did anybody dream that any mistake, in the popular and natural meaning of the word, occurred at all.

Now, my Lords, let us see what the state of facts was. This young woman is told that there was a mistake in the deed. I will come presently to the mode and the circumstances in which she is told; but I assume for the present purpose, and I think it is established, that she was told there was a mistake in the deed. What must have been the condition of mind of a person who was told that? Whatever rights were given by the original deed, as I took occasion to say in the course of the argument, any self-respecting person, much more a person bound by endearing ties such as ought to exist between husband and wife, when she was told a mistake had been made, would say at once, "If there was a mistake made, I will give in at once, and I will put it right." That seems to me to be the most natural and ordinary course, giving the person no extraordinary credit for virtue or self-denial. But suppose, instead of being told that there was a mistake, she had been told, "When we made this deed we gave you certain rights, and it may happen hereafter that you will have such and such control and power over this property, which we did not think of at the time we executed the deed, but which we do not think you ought to have now": would not the attitude of mind of the person to whom such an observation as that was made be entirely different from the one which I suggested just now? It does not require argument, I think, to make that out.

Now this lady applies to a person, and the natural person to whom a wife would apply under these circumstances would be the person who had been the family solicitor, and who was her husband's solicitor, apart from the question, which I cannot leave out of sight here, that he was her trustee.

Then, the issue being, What was it that was said to her when she was induced to execute this deed? I find in her cross-examination—of much of which I disapprove, for from time to time words were put into her mouth as if she had said

them, though she had not—what seems to me to be overwhelmingly conclusive about this matter; not a statement alone by her, but an assumption by the learned counsel who is cross-examining her: "(*Q.*) Do you mean to tell his Lordship that you did not know perfectly well that the deed was altered in connection with what your husband had been saying? (*A.*) No, I did not. (*Q.*) What do you think it was altered for? (*A.*) To rectify mistakes that had been made. (*Q.*) What mistakes? (*A.*) I do not know. (*Q.*) Did not you ask? (*A.*) No, I expected it was all right. (*Q.*) You knew it was to alter the settlement? (*A.*) Yes, of course, it was altering it. (*Q.*) And you knew that after the settlement had been made your husband had complained and talked in this violent way to you about your family and about his money going to them—you knew that? (*A.*) Only from what Mr. Skinner had said to him. (*Q.*) You knew it? (*A.*) Yes. (*Q.*) Then you knew that according to your husband's view there was a mistake in this settlement, whatever the mistake was? (*A.*) Yes. (*Q.*) And you knew that it was to rectify a mistake that he had found in the settlement? (*A.*) Yes."

Now, my Lords, it is manifest that what the lady is assenting to is what is actually put to her by the learned counsel who appears against her. He assumes as the result of the evidence before him—and I suppose upon his instructions that that was the state of facts—that that was what was told her. If so, it is impossible to doubt that that was a misrepresentation. It is all very well to say that the word "mistake" may be used in a popular and ambiguous sense. I am not quite certain that I understand what is meant by that. If it is meant that there was a mistake made at the time of the execution of the deed of 1890, it is not true. If it is meant that after full consideration and after the lapse of six months the parties had begun to think again what would be the effect of the deed which they had already executed with perfect knowledge, and with great deliberation, and thought that the effect of it might be different from what they had at first supposed, then that is not a "mistake" in any sense, but it is something which shews that when they had considered the

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matter more maturely, or in view of some facts which afterwards happened, they thought, not indeed that it was a mistake at all, but that in view of events following the deed, peradventure the arrangement they had made in the deed might have a different effect from what they had anticipated it would. But what then? It was not a mistake at all. No mistake was made at the time of the execution of the deed in 1890; but they thought better of it. Suppose they had said to this lady, "We have changed our minds; we do not want to give you such rights as those we gave"—I have already commented upon what would be the result of that.

Now, my Lords, what seems to me, with the utmost respect to the learned judge who found the other way, and to the Court of Appeal, whose judgment I think ought to be affirmed, I think that none of the Courts have recognised what appears to me to be the accumulated force of all this. Here was a young woman without advice. She had begun, unfortunately, by reason of her husband's habits of drink, to contemplate a separation. She goes to this gentleman and asks him for advice. He says he did not know she came to him as a solicitor. He says there was no entry in his book making her his client. It seems to me that that is really blinding one's eyes to the course of human events. She went to him as a friend. In one sense she did not go to him as a solicitor at all, I agree; but she went to him as the natural person to whom to apply for protection. He says that he stated the facts and he did not advise her. I will not juggle with words. I know what she went for, from the statement of both of them—she went there to consult a friend. He was a solicitor too, and he was her trustee. Was he under no duty to his cestui que trust to tell her what her rights were, and what the rights were which she was giving up? My Lords, it seems to me, I confess, hardly susceptible of argument. He was under a duty as a friend, as a solicitor, and as her trustee, to take care that she thoroughly understood what was the supposed error which had been made in the first instance, and to make her understand what the effect of what she was doing was. She says in the most natural way that she did not know what it was. She

was told that there was a mistake, and of course he was to alter the settlement. Now, I venture to say she did not know what the mistake was. There is not a single word from beginning to end throughout the course of the evidence given by this gentleman himself to the effect that he ever did explain to her what the "mistake," as he called it, was, and what the effect upon her rights would be. He says that he thorougly explained the deed. Your Lordships have seen the deed, and you will form your own judgment of what sort of definite idea there would be in the mind of this young woman when this deed was read over to her and explained.

My Lords, I have thought it right to say so much out of respect for the learned judge, who took a different view, although it appears to me to be abundantly clear what the judgment of the House must be.

I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Speaking for myself, I think this is a plain case. I do not at all concur with an observation to be found in one of the judgments of the Court of Appeal—that the case is very near the line. I think it is perfectly plain; and, although the cross-examination was protracted and diffuse and as perplexing (I should fancy) to the lady who was cross-examined as it has been to some of your Lordships, the case really lies within a very narrow compass. In my opinion it depends on a few facts which have not been and which cannot be controverted.

My Lords, in September, 1891, Mr. Joseph Willis, who is now dead, and his wife, Annie Butler Willis, afterwards Mrs. Barron, the plaintiff, were living together. The relations between them were very strained, not on account of any fault of hers, but on account of the intemperate habits of her husband. He seems to have been drinking himself to death as fast as he could, and except in sober intervals he behaved to his wife brutally and coarsely. Now, at that time, under a deed made in 1890, property to the amount of about 15,000*l.* was in settlement. The first life interest was given to Mrs.

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Ann Willis, the mother of Joseph Willis. Subject thereto, there was a life interest given to Joseph Willis with certain provisions intended to protect him from the consequences of his own misconduct, and then Annie Butler Willis, the wife, had a life interest. In the event of there being no issue, and in default of the exercise of a joint power of appointment, the survivor of the husband and wife had an absolute power of disposition over the property. There was an ultimate trust in favour of a cousin of Mr. Willis and Frederick Herbert Skinner, then a minor, in equal shares. The settled property belonged originally to Mrs. Ann Willis and Mr. Joseph Willis—the younger Mrs. Willis did not contribute anything to it. So far as she was concerned the settlement was voluntary; but the interest she took under the settlement was as much her property as if she had provided the whole or the greater part of the fund. The settlement was prepared by Mr. William Moore Skinner, who seems to have been a solicitor in large practice. He was a very intimate friend of the Willis family, he was the family solicitor, he was the father of Frederick Herbert Skinner, and he was a trustee of the settlement.

My Lords, I do not attribute anything like dishonourable conduct to Mr. Skinner. I have read the whole of the evidence and all the letters, and I do not think there is any ground for attributing anything dishonourable to him; but I do think that he neglected his duty on more than one occasion. I think it was a very unfortunate thing that he permitted himself to accept this gift in favour of his son without taking the ordinary precautions which the law requires in such a case. I cannot help thinking that a great deal of the difficulty in this case has arisen from his having neglected his duty on that occasion. In his conduct towards the plaintiff, I think he neglected his duty over and over again; he seems to have been aware that he had a duty to her, but his attempts to fulfil that duty were feeble, and in the result misleading.

In September, 1891, there was a good deal of discussion between Mrs. Ann Willis and her son and the solicitor about these unfortunate differences, as they are called, between the husband and the wife. In the course of those interviews the

settlement came up for discussion, and then, apparently for the first time, Mrs. Ann Willis and Mr. Joseph Willis expressed their dissatisfaction with the contents of the settlement, as being too liberal to young Mrs. Willis, and they told Mr. William Moore Skinner to have it altered to her detriment. He laid instructions before counsel without saying anything to young Mrs. Willis, though only a few days before she had had an interview with him on business. He says she was not consulting him on that occasion; but whether she went to him as friend or solicitor, she did in fact consult him on a very delicate matter as regards her relations with her husband and her interest in the settled property. However, before he sent the instructions to counsel he did not think it necessary or right to consult her, or even to intimate to her husband or to her husband's mother that she ought to be consulted. At the conclusion of his instructions to counsel he says: "If any difficulty should arise as regards the assent of Mrs. Willis, junior" (it is clear, therefore, that he had not got her assent at that time, and that he thought it possible that there might be some difficulty about it), "it is assumed the Court of the Chancery Palatine of Durham will be competent to rectify the settlement in the way desired, and that no Court of law would hesitate to grant the relief asked from it." Counsel was of a very different opinion. He settled the deed as requested, but at the end of the draft he put this note: "As regards the action of the Court, it does not appear to me that any alteration could be obtained, for, although the provisions are somewhat unusual, it seems to me clear that the settlement was made on full consideration, and the Court would only interfere on the ground that the trusts were contrary to the intentions of the parties at the time of execution of the settlement. I cannot see how this could be proved to the satisfaction of the Court." That was the opinion of the gentleman who was concerned in the preparation of the earlier deed, and who had gone through it at the time very carefully with Mr. Skinner.

The draft was settled on September 22, 1891. What does Mr. Skinner do then? He does not send it to the lady and explain it to her, or anything of the kind. He sends a fair

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copy of it to the husband with this letter: "Dear Sir,—We beg to inclose you a fair copy of the proposed deed to rectify your marriage settlement." That is his description of the deed just after he had been told what he must have known—that rectification was out of the question. "Please read it over to your wife, and see if it meets her approval as well as your own. If it does, return same to us, when we will have it engrossed ready for the signature of all parties without delay." So that he seems to have considered even then that he had a duty to the wife; but he employs the husband—a very extraordinary medium considering what had passed quite lately at the interview between him and the lady—he employs the husband to explain to her the propriety of the whole of her interest being taken away in the event of her marrying after his death. It is not surprising that Mr. Willis, acting on Mr. Skinner's hint, told his wife that the deed was to correct a mistake in the settlement. Then he sent back the draft by his mother. Nothing further took place till September 30. On that date Mr. Skinner chose an extraordinarily inopportune time for explaining matters to this lady. He was called in to make a will for her mother, who was on the point of death or, at any rate, in a most critical condition, and then he says he explained everything to her. She says she does not remember anything of the kind. I think it is extremely likely, considering the position in which she was at that time, that she paid very little attention to what was going on, and the whole thing may have vanished from her mind; but let us take Mr. Skinner's own account of it: "I saw the plaintiff," he says, "in the dining-room of her mother's house, and I explained to her that Mrs. Willis and her son had called upon me in the way I have already stated, and that they desired to have the deed altered for the purpose of depriving her of the life interest which she took under the original settlement, cutting down that interest to an interest during her widowhood, and depriving her of the power of disposing of the property provided she survived her husband without their having jointly executed it." Then come these words: "I explained it as clearly as it was possible for me to do, and as it was my duty to do." So

that he plainly recognises that there was a duty cast upon him with regard to this lady. He had the duty, as he says, of explaining it; she did not go to him for explanation; he came to her. He felt that he had this duty; but what on earth was the use of explaining what was going to happen to her unless he also explained to her clearly what her position was, and what course was open to her and what she ought to do under the circumstances? I quite believe what she says, that she went through with the execution of this deed under the impression that it was merely to correct a mistake which had been made in the original settlement. Her husband certainly told her so. Mr. Skinner admits, or half admits, that he told her so too. He will not swear that he did not use the word "mistake" in speaking to her. Putting out of consideration the fact that Mr. Skinner's son got a great advantage, I must say I think, even if the person who was the ultimate remainderman had been no connection of Mr. Skinner, there would have been ample ground to set aside this deed, considering that Mr. Skinner was her family solicitor, the person to whom she would naturally go for advice, and that he was also her trustee. It makes it rather stronger when you see that the effect of this alteration was to make certain, or almost certain, a gift in favour of Mr. Skinner's son which was contingent and doubtful until the deed was executed.

My Lords, I have no hesitation in concurring in the motion which has been proposed. I think this appeal ought to be dismissed with costs.

LORD SHAND. My Lords, I am entirely of the same opinion. I concur in all the observations that have been made by my noble and learned friends, the Lord Chancellor and Lord Macnaghten, and I shall add only a few words to what they have said. It appears to me to be quite plain that it was the duty of Mr. Skinner on the occasion of the execution of the deed of 1891 to have required that the lady should put her interests into other hands, and that he should not have been the person to advise her upon those interests. I think, looking at the relations between the parties, looking to the

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fact that Mr. Skinner was a friend and was trustee in the administration of the funds upon which she was dependent for her subsistence through her husband, and that he was her agent, as I take it he was, in the circumstances which have been disclosed, it was clearly his duty to require that she should get independent advice. It is said that he explained the matter to her. I agree with my noble and learned friend, Lord Macnaghten, in thinking that that explanation was not sufficient or satisfactory, even as stated by Mr. Skinner himself, as given to her in the evening at her mother's house, but which is, however, disputed or denied by her; but, whatever explanation may have been given, I do not think that explanation by him was enough. I think, looking at the circumstance that there was a great disadvantage to Mrs. Willis in the execution of this deed in which she was renouncing valuable interests—at the circumstance that at the same time a benefit was being given to Mr. Skinner's own son by that act of renunciation, and at the circumstance of Mr. Skinner's position as law agent, as I think she was entitled to take him as being at the time—looking at these circumstances, I am clearly of opinion that nothing short of putting the interests of this lady into other hands would have satisfied the case, or have avoided the legal result which now follows. An independent agent would, it may be assumed, have explained to her that the deed was not for the purpose of merely correcting a mistake, but was intended materially to alter her position, and to cut down, and on her part to renounce, important pecuniary rights. Even laying out of view the advantage to be gained by Mr. Skinner, junior, the observations of counsel would in all probability have been forcibly laid before her. To this independent advice I think she was entitled.

I am of opinion, therefore, with your Lordships, that the judgment appealed from ought to be affirmed.

LORD DAVEY. My Lords, I am of the same opinion, and I do not think it necessary to make any detailed examination of the facts of the case which are brought out in the examination and cross-examination of the witnesses, as I agree with what

has been said on that point by my noble and learned friend on the Woolsack and my noble and learned friend opposite, Lord Macnaghten.

The first question is to inquire what the deed of 1891, which was sought to be set aside by this action, did; and I find that it did two things, and two things only. In the first place, it cut down the life interest which the plaintiff was entitled to during her life, in case she survived her husband, to an estate so long only as she should remain his widow and not marry again; secondly, it made a material alteration as to her interest in the capital fund, and indeed it deprived her of any prospect of sharing in the capital fund, for whereas under the original deed she would have had a joint power of appointment with her husband during their joint lives, and if she survived him a separate power of appointment, she gave up both her joint power during their joint lives, and also the chance of having a power of disposition in case she survived her husband.

Now, my Lords, it will be observed that those alterations in the deed were concessions which came entirely from her side, and that no alteration was made in her favour, and no consideration of any sort or kind, no quid pro quo, was provided for her by the deed.

My Lords, the next question I ask is, What was the position of Mr. William Moore Skinner? Mr. Skinner was her husband's solicitor, and indeed he was the solicitor for the whole family, and not only for the whole family, but it appears that he also attended Mrs. Brown, the plaintiff's mother, when she was on her deathbed, and I think made Mrs. Brown's will for her. But he was more than that. He was also a very intimate family friend of the Willis family, including the plaintiff and her husband, and was a trustee under the original settlement. My Lords, I think it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is primâ facie entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman.

Now, my Lords, the result of the evidence upon my mind,

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without going into details, is that this lady did in fact rely upon Mr. William Moore Skinner to advise and assist her as her solicitor. I do not find that Mr. Skinner ever repudiated the obligation to advise the plaintiff. I am aware that he says that he was somewhat sore at the suggestion that he had made a mistake with regard to the earlier deed, and that he required not Mrs. Willis only but her husband and her to go and consult another solicitor across the street. But, my Lords, that is a very different thing from advising the plaintiff to be advised by a solicitor separate from her husband. The suggestion which he says he made was that they should both go and consult another solicitor. What he ought to have done was to advise her to consult a solicitor separate from and independent of her husband. It is to be observed that the deed was in fact prepared by him on behalf of all parties, and I cannot find throughout this long evidence that any suggestion was ever made by anybody that it had been perused or settled by any person on her behalf. Therefore, I take it to be clear that he was the only solicitor acting for her in the matter, and that he was the solicitor who prepared and perused and settled the deed on behalf of all parties. Indeed, Mr. Skinner seems to have accepted that situation, and to have taken some pains to explain the contents of the deed to the plaintiff. But, as Rigby L.J. says, that was not enough. She required not only explanation as to the meaning of the deed, but what she wanted was, or what she had a right to look for was, advice as to her rights.

My Lords, the next question I ask is, What was the knowledge of the plaintiff and the information given to her as to the circumstances and the purpose for which the deed was to be executed? On those points, again, I will not trouble your Lordships by reading long passages from the evidence, because I agree with the Lord Chancellor that the information given to her, and her belief founded upon that information, was that a mistake had been made in drawing up the previous deed, and that all that was asked of her was to put right or rectify a mistake which had been made—inadvertently made—by the parties.

Now, my Lords, it is of course a commonplace to point out the widely different position of a woman who is asked to put right a mistake made in a deed under which she derives very considerable advantages, and that of a woman who is asked, the parties to a deed which conferred an advantage upon her having changed their minds, whether she will assist them to carry out, not their original mind and intention, but their new mind and intention. It is admitted by the learned counsel for the appellants (and the admission could not have been avoided) that there is no evidence that any mistake of fact had really been made in drawing up the previous deed. What we must understand is, that the parties, having realized the effect of what they had done, had changed their minds. Now, if she had consulted a separate solicitor he would have told her that it was not a case of a mistake which any person of right feeling who was taking a gift from others might have considered himself under an obligation to put right. In such circumstances I should think most fair-minded persons would say, "I will not accept a gift which has been made to me under a mistake." If she had consulted a separate solicitor, he would have told her what her real position was, and what were the rights which she was entitled to under that deed; at the lowest, he would probably have succeeded in making a bargain and securing for her countervailing advantages in place of those which she was asked to give up.

My Lords, I therefore think that the judgment of the Court of Appeal in this case must be affirmed, on the ground that the plaintiff did not understand the purpose and intention or the true effect of the deed of 1891, and that such failure to grasp the true effect of the deed arose from Mr. Skinner, who had assumed the position and the obligation of advising her, having failed to give her proper advice.

My Lords, the alterations made in the deed made an important difference in the position of young Mr. Skinner, who was entitled to a moiety of the capital in default of the exercise of any of the powers of appointment which were given by the settlement. In the first place, his prospect of succeeding to a share of the capital depended on the single contingency only of Joseph Willis dying without having exercised the power of

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appointment, instead of the double contingency of the joint power not being exercised and the wife being the survivor (which event actually happened) and her not exercising the power. He also gained a considerable advantage by his prospect of succeeding to the capital being accelerated by the plaintiff's life interest being cut down to an interest during widowhood only.

I therefore think that the decision of the Court of Appeal may also be supported upon the ground upon which the learned judges of the Court of Appeal based it, namely, that Mr. William Moore Skinner's son could not take a benefit from the plaintiff without shewing the righteousness of the transaction, or, in other words, that she had independent advice and assistance as to her rights and real position. I therefore concur in the judgment which has been proposed.

LORD BRAMPTON. My Lords, the deed of 1890 was all the parties intended it should be and no more.

After the deed was executed the settlors changed their minds and desired to limit the benefits it conferred on the plaintiff. This could only be done by getting the plaintiff to sign the deed in question to effect this alteration. The deed was accordingly prepared, and in order to obtain the plaintiff's execution of it she was told it was to rectify a mistake in the original deed. There was no mistake—the parties meant all that was in the deed of 1890. It was in fact untrue to say there had been any mistake at all.

I agree in all that has been said by my noble and learned friend on the Woolsack, and my other noble and learned friends who have expressed their views, and in the judgment proposed.

LORD ROBERTSON. My Lords, I entirely agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 13, 1902.

Solicitors: *Balfour Allan & Co., for Skinner, Church & Michael, Sunderland; Wynne-Baxter & Keeble, for Beldon & Ackroyd, Bradford.*

[HOUSE OF LORDS.]

GRESHAM LIFE ASSURANCE SOCIETY, LIMITED . . . . . } APPELLANTS;

AND

BISHOP (SURVEYOR OF TAXES) . . . RESPONDENT.

H. L. (E.) 1902 *May* 16.

Revenue—Income Tax—Company—Interest from Foreign Investments—Receipt in the United Kingdom—Income Tax Act, 1842, *c.* 35, *s.* 100, *Sched. D, Fourth Case—Income Tax Act*, 1853, *c.* 34, *s.* 2, *Sched. D, s.* 5.

Interest arising from foreign securities and paid abroad is not "received in the United Kingdom" within the meaning of the Income Tax Act, 1842, s. 100, Sched. D, Fourth Case, and is therefore not chargeable with income tax under that clause, unless it is remitted to the United Kingdom.

A life assurance society carried on business at home and abroad, the head office being in London where the accounts and balance-sheets were made up, the profits ascertained and the dividends paid. The interest upon the society's foreign securities paid abroad was received there by their agents, and part of it was applied abroad for the purposes of the society. All the interest on foreign securities was taken into account in the balance-sheets upon which the profits were ascertained:—

Held, that taking the interest into account was not equivalent to a receipt in the United Kingdom, and that income tax was not chargeable upon that part of the interest which was not remitted to the United Kingdom.

The decision of the Court of Appeal, [1901] 1 K. B. 153, reversed.

THE following is a summary of the facts stated in a special case by the Income Tax Commissioners for London and in a supplemental statement which are fully reported below. (1)

The appellants carried on the business of life assurance in Great Britain and also abroad, where they had local agents or managers. The head office of the society was in London, and the whole management and control of the business was, subject to the meetings of the shareholders, vested in the board of directors in London, where the meetings were held, division of profits declared and dividends paid. The society had foreign investments the interest on which was paid abroad. That interest was either remitted to Great Britain, or reinvested

(1) [1901] 1 K. B. 153.

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abroad in the country where it was paid or in other foreign countries, or applied abroad for the purposes of the society. The word "interest" in this summary includes dividends and rents.

All interest, including that on foreign securities, was included as money received by the society in the revenue accounts, and set out in the valuation balance-sheets upon which the profits were ascertained. The accounts were made out at the head office. The society paid income tax for the year ending April 5, 1893, upon the sum of 6000*l.* odd in respect of interest upon foreign securities remitted to the United Kingdom. They were surcharged by the Income Tax Commissioners in the sum of 143,000*l.* odd, interest on foreign securities, which had not been so remitted. The Queen's Bench Division (Grantham and Kennedy JJ.) confirmed the decision of the Commissioners, and the Court of Appeal (A. L. Smith M.R., Collins and Stirling L.JJ.) dismissed the appeal. Neither the order of the Queen's Bench Division nor the order of the Court of Appeal answered the specific questions raised by the case and reported below. (1) The society brought the present appeal.

Feb. 17; March 3, 6. *Sir Edward Clarke, K.C.*, and *Haldane, K.C.* (*Stewart-Smith* with them), for the appellants. The appellants are not liable to pay tax on anything but profits and interest on foreign securities remitted to the United Kingdom. "Income tax," said Lord Macnaghten, "is a tax on income. It is one tax, not a collection of taxes essentially distinct." So Lord Davey: "The word 'profits' is the word selected by the Legislature for describing generally the subjects of taxation under the Income Tax Acts. . . . . The income tax is intended to be a tax upon a person's income or annual profits": *London County Council* v. *Attorney-General.* (2) The society has paid the tax upon the interest on foreign securities which has been remitted to the United Kingdom. What is not remitted is not chargeable. By the Income Tax Act, 1842, s. 100, Sched. D, Fourth Case, the duty on the interest arising from foreign securities is to be computed "on a sum not

(1) [1901] 1 K. B. at p. 156. (2) [1901] A. C. 26, 35, 45.

less than the full amount of the sums . . . . which have been or will be received in" the United Kingdom. The interest now in question has not been received here. The words mean an actual, not a "constructive" receipt. The decision of the Court of Session in *Standard Life Assurance Co.* v. *Allan* (1) is in point: money from foreign investments not remitted home but reinvested abroad was held not chargeable; and the decision of the Court below in the present case was disapproved, as well as that of the Divisional Court in *Universal Life Assurance Society* v. *Bishop*. (2) Lord Moncreiff observed that these cases seem to have proceeded upon a misapprehension of the Scottish decisions in *Scottish Mortgage Company of New Mexico* v. *Commissioners of Inland Revenue* (3) and *Forbes* v. *Scottish Provident Institution*. (4) The former was wholly different from the present case. It was really one of estoppel. There was interest from invested funds in America which ought to have been brought home. There was capital in this country to be invested in America. An amount of the latter exactly equal to the interest was distributed as income. This distribution, unless it were an admission of receipt of the interest from America, was wholly illegal. *Forbes' Case* (4) is in the appellants' favour. *Clerical, Medical, and General Life Assurance Society* v. *Carter* (5) is inconsistent with the principles established in this House in the London County Council case above quoted. The principle contended for here was applied in *Colquhoun* v. *Brooks* (6) under the Fifth Case.

Sir R. B. Finlay, *A.-G.*, and *Rowlatt* (*Sir E. Carson*, *S.-G.*, and *Danckwerts*, with them), for the respondent. The money was set off in account against sums which would otherwise have been sent from the United Kingdom, and profits were distributed on the footing that the money had been received. The words "received in the United Kingdom" cannot be confined to physical receipt, but are used in the ordinary business meaning. The whole system of payment by crossed

(1) (1901) 3 F. 805.
(2) (1899) 68 L. J. (Q.B.) 962.
(3) (1886) 14 R. 98; 2 Tax Cas. 165.
(4) (1895) 23 R. 322; 3 Tax Cas. 443.
(5) (1889) 22 Q. B. D. 444.
(6) (1889) 14 App. Cas. 493.

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cheques is inconsistent with so narrow a view. In accordance with modern language money is received wherever its benefit or value is obtained. Where debts are paid out of money abroad which would otherwise have to be paid out of money here, there is a receipt here because the debtor is discharged. The decisions on the analogous expression "paid in cash" are in point. Set off, or credit in account, or any bonâ fide transaction which could support a plea of payment is equivalent to "payment in cash": *North Sydney Investment and Tramway Co.* v. *Higgins* (1) and *Larocque* v. *Beauchemin* (2), and the cases there cited. *Carter's Case* (3) was rightly decided, and Collins L.J. below put the case correctly and forcibly—that there was clearly a receipt in point of law, and that the appellants' argument would require that actual bullion should be sent from one side of the Atlantic to the other. The *New Mexico Case* (4) is similar to this, there being payment in account in both instances. *Forbes* v. *Scottish Provident Institution* (5) is not inconsistent with the Crown's claim here, as the money there was not dealt with in any way, whereas in this case the money is employed to relieve the company's exchequer in England by paying debts abroad. This interest, to use Wright J.'s words in *Norwich Union Fire Insurance Co.* v. *Magee* (6), "is brought into account as part of the profits and gains of the business." The language of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (7)—"a debt due and payable in England to the foreign shareholders is discharged by the money retained in America. That . . . . is equivalent to a receipt of the money here"—accurately expresses the law here applicable.

Sir E. Clarke, K.C., in reply.

The House took time for consideration.

May 16. EARL OF HALSBURY L.C. My Lords, the question in this case seems to me to depend upon the actual words

(1) [1899] A. C. 263.
(2) [1897] A. C. 358.
(3) 22 Q. B. D. 444.
(4) 14 R. 98.
(5) 23 R. 322.
(6) (1896) 3 Tax Cas. 457.
(7) [1893] 2 Q. B. 499; 3 Tax Cas. 213, 223.

used by the Legislature, and I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature. To put the matter shortly, the Legislature has provided that, besides the proper amount of taxation upon the balance of profits and gains by any person resident in this country, he must also pay upon the interest on any investment made in foreign countries, and that the duty must be levied upon the full amount received without any deduction; but then this impost is only to be levied provided the money is received in this country.

Now, here the money has not actually been received in this country. It is to be observed that the Legislature has assumed, by the distinction which it has made between the mode of ascertaining the amount payable generally upon the balance of gains and profits, and the amount taxable in respect of the interest payable upon foreign investments, that it has earmarked that sum and made it subject to distinct and peculiar incidents. The difficulty of identifying the actual sum is no limit on the enactment. The Legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account. If it were not for the difficulty of earmarking money, I should think no one would have any doubt that the money must be received in this country to bring it within the words of the statute. If it were not money but some commodity, say tobacco, which a trader carrying on business in London and Paris was accounting for to his London house, no one would say that though the Paris tobacco was credited in account as a set-off against some expense or something that the supposed London firm had to set off against the same claim, and that as the London firm was paid by the Paris tobacco, therefore the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm.

In no way that I can give any reasonable interpretation to has the money reached this country or been received in this country. It, like the tobacco in the case suggested, has not

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been imported, and if the Legislature had intended that bringing it into account was to be equivalent to its being received, it would have been easy to say so. It cannot be said that the use of artificial meanings to be attached to ordinary language is either unknown or unusual in legislation; and if it was intended to make this a special subject of taxation to be taxed whenever and wherever an equivalent amount was credited or booked or in any other way recognised as having come under the dominion of the owner in this country, nothing could have been easier than to enact it in plain terms. I decline to go beyond the words used, and I do not think this money was received in this country.

I do not think any amount of book-keeping or treatment of these assets, wherever they may be, will be equivalent to or the same thing as receiving the amount in this country. The words are simple, intelligible, and represent an ordinary and simple thing. I cannot think we ought to go beyond the words themselves, and I think this judgment ought to be reversed.

LORD MACNAGHTEN. My Lords, I am also of opinion that the judgment of the Court of Appeal cannot be supported. The question depends upon the meaning of the rule applicable to the fourth case of Sched. D. To my mind the language of the rule is so plain that it is difficult, if not impossible, to add anything which would make the meaning plainer.

The appellants are possessed of foreign securities. The duty to be charged in respect of interest arising from foreign securities is, according to the rule in question, to be computed on a sum not less than the full amount of the sums which have been, or will be, received in the United Kingdom in the current year. I do not understand what is meant by constructive receipt in such a case as this, or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or unless there has been a remittance "payable in the United Kingdom," to borrow the language of the rule applicable to the fifth case. The circumstance that the business of the society is "one indivisible business," and that the society in the statement of

its affairs and in its dealings with its shareholders and customers takes into consideration its foreign assets and liabilities, seems to me to be immaterial to the present question. As my noble and learned friend Lord Robertson, when Lord President, observed in *Forbes* v. *Scottish Provident Institution* (1), "Every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up." But that, as I think, and as the Lord President thought, is a very different thing from bringing the interest home—a very different thing from the receipt of the money here, either in specie or as represented by a remittance payable in this country.

The difficulty seems to have arisen from a misunderstanding or a misapplication of the judgment in the *New Mexico Case*. (2) That was a very special case. Whether the decision was right or wrong, it can have no bearing upon the question now before your Lordships. Speaking for myself, I think the decision was right. In that case, as it seems to me, in the transmission to this country of money which the company was free to distribute, and the transmission to America by way of exchange of an equivalent amount which the company was bound to reinvest, the company acted as their own bankers, and did for themselves, by an entry in their books, what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf. I think that the appeal must be allowed.

LORD SHAND. My Lords, I am also of opinion that the appeal should be allowed. It is true that the appellants received the interest on their foreign securities by the hands of their agents abroad. But I think it is equally true that, as they left that interest where it was gained, it was never received in this country. When it was entered in the company's balance-sheet in order to the ascertainment of the profits of the year, it was so entered as estate which had not been received in England, but as property belonging to the

(1) 23 R. 322. (2) 14 R. 98.

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company which they acquired abroad, which had not been brought home or received here, but which was part of their foreign assets. Interest on securities in that position was properly taken into account in the ascertainment of the year's profits, not because it had been received in England, but because, although not so received, it was part of assets of value which the company had acquired and held abroad.

In the case of the *Scottish Mortgage Company of New Mexico* (1) the species facti was different, for there the company treated the money as received in this country, and merely saved themselves the expense of cross-remittances. It appeared there that the company was not entitled to divide the money earned abroad unless it was received as profits in this country. It was treated as so received merely to avoid the expense and inconvenience of cross-remittances—money sent home, and the same amount sent back by cross-cheques or drafts. That was a material point in the decision of the case as shewing that the money had been really received in this country.

LORD BRAMPTON. My Lords, it is conceded that no part of the money in question was ever received in the United Kingdom in specie or in any form known to the commercial world for the transmission of money from one country or place to another. But it was argued that if not actually it was "constructively" so received in the accounts of the society. I confess I do not like that expression, nor do I quite understand what it means. If a "constructive" receipt is the same thing as an actual receipt, I see no reason for the use of the word "constructive" at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognised by the statute, which, in using the word "received" alone, must be taken to have used it having regard to its ordinary acceptation.

The Master of the Rolls (Sir A. L. Smith), in his judgment in the Court of Appeal, while stating that there must be "an actual receipt of the amount," added, "but that receipt need not be in specie, it may be in account"; and he then proceeded to deal with the accounts of the appellants set forth in

(1) 14 R. 98.

the appendix, and to draw from them the inference that the appellants had actually received and dealt with these foreign dividends in the United Kingdom, and had distributed them as having been so received. Now, I am not prepared to deny that accounts may be so worded as to contain admissions justifying such an inference, but I differ with the view he took that such admissions, or anything approaching them, are to be found in the accounts before your Lordships.

Those accounts were framed partly to satisfy the requirements of the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), that at the end of each financial year a statement of the company's revenue account and of its balance-sheet in the forms contained in the first and second schedules should be furnished to the Board of Trade, and partly in obedience to arts. 77 and 78 of the society's deed of settlement, directing books to be kept in which full entries shall be made of all matters which shall properly be the subject of debt or credit account, so that the financial state of the company may at all times appear as accurately as circumstances will permit; and, further, directing balance-sheets to be made up yearly and sent to every shareholder. The accounts before your Lordships profess to do no more than this, and no inference of fact can be drawn from them other than or in addition to those stated in them. In my opinion, there is total absence of any evidence to justify a finding that the interest in question has ever been received in the United Kingdom.

For the Crown the case of the *Scottish Mortgage Company of New Mexico* v. *Commissioners of Inland Revenue* (1) was much relied upon. I am not satisfied with the correctness of the judgment in that case, but, assuming it to be sound, it is distinguishable from the present case, for in paragraph 13 of the printed case before the Court of Session there was an admission that the amount charged with the income tax had been applied in payment of interest and dividends to debenture and shareholders in Glasgow. No similar admission was contained in the accounts in the case before this House.

I think that the appeal should be allowed with costs.

(1) 14 R. 98.

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LORD LINDLEY. My Lords, this appeal turns upon the answer to be given to a simple question of fact. Has a certain sum of money entered by the Gresham Society in its accounts as an asset been received in this country by the society, or has it not? If it has, the appeal ought to be dismissed; on the other hand, if it has not, the appeal ought to be allowed.

First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.

Now, in this case the Gresham Company's accounts and the statements in the special case clearly establish the fact that the sum of 143,483*l.* sought to be charged with income tax consists of interest and dividends received abroad by the agents of the company from persons abroad who have paid those agents. The case and accounts do not state the exact mode in which the various sums making up the total of 143,483*l.* were paid to the agents of the company. The payment is admitted, and the receipt of that sum by the company, through its agents, is not in dispute.

But then comes the second question: Has that sum been received in this country by the Gresham Company? The special case clearly shews that it has not in fact been remitted to this country in any way whatever. Applying the test already suggested, no one here has received that sum; the

agents who received it abroad still have it abroad, or have dealt with it otherwise than by sending it to the company here. No account even is forthcoming to shew that the sum has ever been treated as remitted here, so as to justify the inference that in any commercial sense the sum has been received in the United Kingdom as distinguished from other countries.

What has been done, and all that has been done, is that the Gresham Company, in making up its accounts with a view to ascertain what profits it could divide in a particular year, entered on its asset side the sum of 143,483*l.* as money received during the year. This was obviously right; for the object was not to ascertain the profit made in any particular country, but the profit made by the company on all its transactions all over the world. The company has paid duty on the profit so ascertained, and no question arises as to that. But when required to pay duty on the item of 143,483*l.* on the ground that this sum is made up of interest or dividends received in the United Kingdom, the company objects on the ground that it represents nothing of the sort. Nor does it, in truth.

The fact that the profits shewn by the account have been divided amongst the shareholders of the company does not carry the case any further. No part of the 143,483*l.* has come over here, or been in any sense received here, and then applied in payment of dividend. Some interest or dividends received abroad have been remitted here, and duty has been paid on them accordingly; but the special case shews plainly that no part of the 143,483*l.* has been so remitted, either for the purpose of paying dividend or for any other purpose.

My Lords, it must be assumed that the language used by the Legislature in laying down the rules to be observed in the various cases contained in the Income Tax Act, 1842, was carefully chosen, and that there was some good and sufficient reason for confining the duty on interest on foreign securities (mentioned in the fourth case falling under Sched. D) to sums which have been or will be received in Great Britain during the year for which the duty is payable. The locality of the receipt is made all important, and it is only by ignoring it or by introducing

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the expression "constructive receipt"—which may mean anything—that the claim of the Crown can be supported.

Sched. D in the Act of 1842 was recast in 1853, and was replaced by a new Sched. D; but the cases and rules in the Act of 1842 are applicable to the new schedule: see ss. 2 and 5 of the Income Tax Act, 1853.

My Lords, authorities have been referred to, and especially the Scottish cases of the *New Mexico Co.* (1), *Forbes* (2), and the *Standard Life Assurance Co.* (3) The first case was very peculiar. Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross-remittances which it would have been unbusinesslike and really childish to have effected in any other way. But thinking, as I do, that that case may be properly upheld, I am not prepared to adopt it as a new starting-point for further inferences. The language of the statute is the true starting-point in each case. *Forbes' Case* (2) and the *Standard Life Assurance Co.'s Case* (3) were both based on this sound principle, and were, in my opinion, both clearly rightly decided. The Court of Appeal, in my opinion, considered this case undistinguishable from the *New Mexico Case* (1), but I am unable so to regard it. Assuming them to be undistinguishable, it would, in my opinion, be more correct to overrule the *New Mexico Case* (1) than to decide the present appeal in favour of the Crown. In my opinion, the appeal should be allowed.

Orders of the Court of Appeal and Queen's Bench Division reversed with costs here and below; repayment to appellants of income tax paid under assessment with interest at 3 per cent.

Lords' Journals, May 16, 1902.

Solicitors: *Devonshire & Co.; Solicitor, Inland Revenue.*

(1) 14 R. 98. (2) 23 R. 322. (3) 3 F. 805.

[HOUSE OF LORDS.]

WRIGLEY . . . . . APPELLANT; H. L. (E.) 1902 April 29.

AND

WHITTAKER & SONS . . . . . RESPONDENTS.

Employer and Workman—Compensation—Employment on or in or about a Factory—Workmen's Compensation Act, 1897 (*c.* 37), *s.* 7.

The enactment in s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . . factory . . . ." means employment on or in or about their own factory. Therefore a workman, who is sent by his employers on their business to a factory in respect of which they are not the occupiers, and therefore not the undertakers within the meaning of the Act, is not entitled to compensation from them for an injury which he receives there.

Francis v. *Turner Brothers*, [1900] 1 Q. B. 478, approved.

The decision of the Court of Appeal, [1901] 1 K. B. 780, affirmed on this point.

The respondents, Whittaker & Sons, engineers, contracted with Bagley & Wright, cotton manufacturers, to make a new driving-wheel for the engine at Bagley & Wright's cotton-spinning factory and fix it there. Whittaker & Sons made the wheel in their own engineering factory and sent their own workmen, of whom the appellant's husband was one, to fix the wheel in Bagley & Wright's factory. While they were engaged in fixing it a stone fell upon the appellant's husband and killed him. The appellant having made a claim for compensation under the Act of 1897 against Bagley & Wright, and also against Whittaker & Sons, the county court judge of Oldham made an award in favour of both sets of respondents. The Court of Appeal (A. L. Smith M.R., and Collins and Romer L.JJ.) affirmed this decision as regards Bagley & Wright for reasons appearing in the report below (1), but not material to the present report. The claim against Whittaker & Sons was not urged before the Court of Appeal, the point being treated as concluded by the decision in *Francis* v. *Turner Brothers*. (2) The present appeal was confined to the claim against Whittaker & Sons.

(1) [1901] 1 K. B. 780. (2) [1900] 1 Q. B. 478.

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Asquith, K.C., and *John Montefiore* (*A. Clement Edwards* with them), for the appellant. The construction put by the Court of Appeal upon the word "factory" in the words of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a . . . . factory" is narrow and unsatisfactory, in view of the intention of the Legislature to protect workmen against the risks incidental to factories. The definition of "factory" in s. 7, sub-s. 2, is not restricted to the employer's own factory, and the reasons for allowing compensation seem equally forcible with respect to any factory to which the workman may be sent by his employer. It is clear that the deceased would have been entitled to compensation if he had been injured while he was making the wheel at the respondents' factory: and so if while he had been lifting the wheel on to a truck in or about the respondents' factory. Looking at the transaction of making, transporting and fixing the wheel as a whole, the denial of compensation is contrary to the spirit of the Act.

Secondly, the respondents were "undertakers" within the definition of the Act, s. 7, sub-s. 2, being for the time the occupiers of Bagley & Wright's cotton-spinning factory, or of a part thereof. By s. 93 of the Factory and Workshop Act, 1878, part of a factory may for the purposes of the Act be taken to be a separate factory. And there may be an actual use or occupation of a factory sufficient to constitute the relation of "undertakers," although the occupation is not exclusive. This has been decided in cases where a ship in dock is in the occupation of repairers for a special purpose, the occupation of the shipowners existing at the same time: *Bartell* v. *W. Gray & Co.* (1)

Cripps, K.C., and *F. H. Mellor*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, after hearing the arguments that have been addressed to your Lordships, I must say there seems to me to be no ground for this appeal.

(1) [1902] 1 K. B. 225.

The thing done was not done in a factory at all. When I say "not in a factory at all," the place where the thing happened was, it is true, a factory for some other purposes, but not a factory within the meaning of these words, which, I think, obviously mean a factory where the original employers of the man were manufacturing—in this case big iron wheels. If the accident had happened there, I agree there would no doubt have been a liability, but in this case there was nothing of the sort. The act of manufacturing the wheel was complete and past; the wheel, when completed, was sent somewhere else. I will assume for this purpose (though I am sure I do not know whether it is the fact or not) that the place to which the wheel was sent was a factory; but it was a factory in another sense, and to say that you can put those two things together seems to me to be absolutely absurd. The thing that was being done was what is described as fitting the wheel to a cotton mill, where the persons who were to pay for it wanted to have it put. Something was done there by a person sent by the original manufacturers, entirely away from their own place of manufacture, and an accident happened. I am wholly unable to put those two propositions together so as to make it possible to argue that thereupon there was an accident happening in the course of the employment in or about the factory, which was for the manufacture of iron wheels. I need not say any more about the case. It seems to me that the appeal is absolutely unarguable, and I move your Lordships that it be dismissed.

LORDS MACNAGHTEN, SHAND, DAVEY, BRAMPTON, ROBERTSON, and LINDLEY concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 29, 1892.

Solicitors: *Mills, Lockyer & Mills; R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.) 1902 May 16.

COOPER & CRANE . . . . . APPELLANTS;

AND

WRIGHT . . . . . RESPONDENT.

Employer and Workman — Compensation — Undertakers — Sub-contractor — Liability of Sub-contractor to indemnify Undertakers — Workmen's Compensation Act, 1897, *c.* 37, *ss.* 1, 4, 7.

In the case of a building a sub-contractor may be an undertaker within the meaning of the Workmen's Compensation Act, 1897.

The appellants undertook to build a house, and agreed with a sub-contractor that he should slate the roof. A workman employed by the sub-contractor was killed in the course of his employment, and his widow was awarded compensation against the appellants as undertakers under the Workmen's Compensation Act, 1897:—

Held, by the Earl of Halsbury L.C. and Lords Shand and Davey, Lords Brampton and Robertson dissenting, that the sub-contractor would have been liable as an undertaker independently of s. 4 of the Act, and that the appellants were entitled to be indemnified by him against the amount of compensation awarded.

Cass v. *Butler*, [1900] 1 Q. B. 777, overruled.

THE following statement of facts is taken in substance from the judgment of Lord Brampton:—

In 1899 Barker & Co., being desirous of having a building erected for them at Nottingham, entered into a contract with the appellants, Cooper & Crane, a firm of builders, by which the latter undertook to construct for Barker & Co. the whole of the building, including the roof and slating. Cooper & Crane made a sub-contract with the respondent Wright, a slater, whereby he agreed to supply the slates and do for them all the slating work of the roof. Cooper & Crane began to carry out their contract with Barker & Co., and by means of scaffolding had constructed the building to a height exceeding thirty feet, including the framework of the roof, ready to receive the slating. While a labourer named Brady, employed by Wright to convey slates to the roof by means of a hoist or lift, was so engaged, an accident occurred to the lift causing him fatal injury, from which he died. His widow applied for an

arbitration between herself, Cooper & Crane, and Wright, under the Workmen's Compensation Act, 1897. Cooper & Crane by their answer denied their liability to pay any compensation on the ground (amongst others) that the deceased man was not immediately employed by them, but was employed by Wright, their sub-contractor. Alternatively they claimed against Wright an indemnity in respect of any amount which might be awarded to be paid by them. Wright by his answer denied that he was the undertaker of any work to which the Act of 1897 applies.

The county court judge at Nottingham made his award for payment of the sum of 217*l.*, with costs, by Cooper & Crane, as undertakers of the building, for compensation to the widow and dependants. He made no award against Wright for payment of any compensation.

On further consideration the learned judge made the order now in question, that Wright should indemnify Cooper & Crane to the extent of the 217*l.* and the applicant's costs. (1)

No appeal was made by Cooper & Crane against the award for compensation. Against the order for indemnity Wright appealed, and the Court of Appeal (A. L. Smith, Collins, and Romer L.JJ.), following *Cass* v. *Butler* (2), set aside the order for indemnity. Against this decision Cooper & Crane brought the present appeal.

(1) The learned judge's reasons were as follows: "It seems that the only question I have to solve is this: Was Wright a person who would have been liable under the Act if the 4th section had not been in existence? He was the employer of the deceased man. He had, under his sub-contract, undertaken the slating of the roof of a building in process of construction and exceeding thirty feet in height. The construction of the building would not have been complete until the slating was finished, and the slating is not merely incidental to the work of construction, but is, in my opinion, a substantial part of the construction itself, and I think the contractor who undertook this part was engaged upon and undertook the construction within the meaning of s. 7, and would have been liable under the Act if s. 4 had not existed, inserted, as it seems to me to have been, not in any way to protect an employer who happened to be a sub-contractor, but to insure that the workman should have the most substantial security for his compensation. I, therefore, hold that Cooper & Crane are entitled to be indemnified by Wright, and I make the order as applied for by Mr. Lindley on their behalf."

(2) [1900] 1 Q. B. 777.

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1901. Dec. 2, 3. *A. Llewelyn Davies* and *Tinsley Lindley*, for the appellants. There is no dispute as to the appellants' liability to the workman. The question is whether the sub-contractor, the respondent, is bound to indemnify the appellants, and that depends on the conjoint operation of ss. 4 and 7. The former deals with "undertakers" and "contractors," and makes undertakers liable to workmen employed by contractors in the same way as if they were direct employers. But the undertakers are "entitled to be indemnified by any other person who would have been liable independently of this section." The general liability is imposed on the employer, independently of any negligence on his part, by s. 1. Thus the right to indemnity arises, as the respondent was the injured man's employer. Further, the sub-contractor is an "undertaker" within s. 7, of whom the definition is "in the case of a building . . . . the person undertaking the construction, repair, or demolition." "Construction" is not limited to the construction of a building as a whole: *Mason* v. *A. R. Dean.* (1) In that case Collins L.J. said that the definition embraced "any person who is engaged on that which is really the construction of a building, inasmuch as the building itself cannot be finished until the construction of his part is completed." *Cass* v. *Butler* (2), which seems inconsistent with the above, is unsound. Otherwise an injured workman might be left without redress, where different persons undertake different parts of the work. The judgments in this House in *Hoddinott* v. *Newton* (3) assume the appellants' contention, though the actual decision is not in point. Lord Macnaghten said: "Nor do I think that 'construction' and 'repair' can be limited to the construction and repair of a building 'as a whole.'" These words "as a whole," he said, "are glosses and I think misleading." The test is supplied in Lord Lindley's judgment in that case: "Unless the additions, improvements, or alterations can fairly be regarded as works of construction . . . . the persons who undertake them are not undertakers as defined in s. 7." There can be no doubt that the process of slating or tiling is "con-

(1) [1900] 1 Q. B. 770. (2) [1900] 1 Q. B. 777.
(3) [1901] A. C. 49, 54, 76.

struction" and the respondent was therefore an undertaker and liable to pay compensation. Sect. 4 expressly contemplates the liability of a sub-contractor, and the only exceptions, such as that of a railway company, are found in s. 7. The rules are in the appellants' favour: rule 2, par. 2, under which these proceedings were taken, contemplates the liability of both contractor and undertaker; and rule 23, par. 2, deals with the indemnity here claimed. There are difficulties in any view of this Act, but that of the appellants involves the least contradiction.

[They also referred to *Cooper* v. *Davenport*. (1)]

Ruegg, *K.C.*, and *Clavell Salter*, for the respondent. The respondent was not the "undertaker" in the sense of s. 7, and a sub-contractor is nowhere aimed at by the Act. Throughout nobody but an undertaker is made liable, and the person referred to in s. 4 must himself be an undertaker. The only persons who undertook the construction of this house were the appellants, and any other view of the Act would lead to extravagant results. Suppose, for example, the undertakers erected a scaffold which was used by a sub-contractor, it would be unreasonable to hold that the latter should be responsible for an accident arising from the negligence of the undertakers. If the appellants are right, anybody who takes in hand a fractional part of a building will be liable to be proceeded against by the undertakers of the whole. It is submitted that *Cass* v. *Butler* (2) is right, and *Mason* v. *A. R. Dean* (3), unless it can be reconciled with the former, is wrong. But in the latter case there were two independent undertakers of separate parts of a building, and the decision has no application to the present appeal. The words of s. 4, relied upon for the appellants, are susceptible of two meanings: "independently of this section" may mean outside the Act altogether—in which case there would be no liability anywhere; or it may mean if the section itself were omitted. Even then the respondent is not responsible, for s. 7 deals with "*the* undertakers," "the persons undertaking the construction," &c. The most that can be said of the respondent is that he was "an" undertaker. There is all the difference

(1) (1900) 16 Times L. R. 266. (2) [1900] 1 Q. B. 777.
(3) [1900] 1 Q. B. 770.

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between the definite and the indefinite article. Collins L.J.'s words in *Mason* v. *A. R. Dean* (1), "any person who is engaged," are too wide, and would include even workmen themselves.

Llewelyn Davies, in reply. The case of an accident to a workman employed by a sub-contractor happening through the default of the undertaker is contemplated by s. 6, which means that if in such a case the sub-contractor has to pay compensation to his workman he shall be indemnified by the undertaker.

The House took time for consideration.

May 16. LORD ROBERTSON. My Lords, like all your Lordships, I have found this a most unsatisfactory question to decide. It can hardly be called a question of legal construction, the problem being how to patch up certain statutory enactments which are incoherent and almost contradictory. The Court of Appeal have adopted a view of which I can only say that it had seemed to me as good and as little exposed to objection as the competing theory; and accordingly I should not have felt justified in disturbing their judgment. But my noble and learned friend Lord Brampton has examined the subject with great care and skill; I have read his opinion with the more attention because it was not in accordance with the opinions of my noble and learned friends opposite; and to the negative, although adequate, reason already given for my not voting for reversal, my noble and learned friend's arguments have enabled me to add an affirmative opinion that his conclusion is right.

LORD BRAMPTON (after stating the facts given above). My Lords, there was no evidence before the judge of any negligence, misconduct, or default on the part of anybody; nor can I find anything to lead me to think that the cause of the accident was ever investigated. No action or proceeding under the Employers' Liability Act could have been maintained against Wright.

The Court of Appeal set the order for indemnity aside upon

(1) [1900] 1 Q. B. 770.

the ground that a mere sub-contractor is not an undertaker within the meaning of the Act. In my opinion, that decision was right, and I will proceed to state my reasons for so thinking. I desire, however, first to remind your Lordships very shortly of the difficulties that, before the Act of 1897, beset a workman who sustained injury in the course of his employment in seeking to obtain redress; for I think that, bearing them in mind, they will assist in enabling your Lordships to form a reasonable conjecture as to the objects the Legislature had in view in passing that Act, and thus in interpreting the enactments contained in it, to which I shall have occasion to refer.

In the first place, there was no available process known to the law by which such redress could be recovered, except by action at law, or by proceeding under the Employers' Liability Acts; but no such action or proceeding could be successful unless the workman was in a condition to prove, by legal evidence, that his injury was due to actionable negligence or other misconduct or default of the person from whom he sought to recover, or some other person or persons for whose negligence he was responsible. Compensation without proof of such negligence was unheard of, and such proof was often hard to discover. Moreover, it was often extremely difficult, even when the facts were ascertained, to determine who was the person liable to be sued in the action; and to avoid such difficulties many persons were often made defendants in actions who were under no legal liability.

Added to these obstacles, the law itself was for the most part too uncertain, too dilatory, and far too expensive for an ordinary workman to embark in. Good illustrations of these difficulties will be found in *Wiggett* v. *Fox* (1) and *Johnson* v. *Lindsay*. (2)

Having regard to this unsatisfactory state of things, it was, as I have gathered from a study of the Act, felt by the Legislature that it would be but just and right to confer upon a large class of workmen, whose necessities compelled them to seek employment in certain specified dangerous occupations, in

(1) (1856) 11 Ex. 832. (2) [1891] A. C. 371.

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the course of which accidents, not always possible to be guarded against, are of frequent occurrence, some purely casual, others no doubt attributable to negligence or default of fellow-workmen, whom it would be idle to sue, or others whose identity could not be established, a right to claim compensation to a moderate and limited amount in respect of the loss of such wages as they were incapacitated from earning in consequence of accidental injury, upon mere proof of the accident and its resulting loss, irrespective of its cause.

Another object was to impose the obligation of providing such statutory compensation upon those to whom good sense would naturally point as the fittest persons to bear it, and to define for the convenience of injured workmen seeking compensation the persons from whom they are entitled to claim it. And, further, to provide a simple proceeding, entailing comparatively trifling expense, by which such compensation might, if necessary, be enforced.

To carry out these very laudable objects the Act of 1897 was passed. It is, however, so framed as to provoke, rather than minimise, litigation; and those who are responsible for the language of some of its enactments little knew the amount of labour they were entailing upon those whose duty it might be to interpret them.

I turn now to the Act itself, the 1st section of which enacts as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

Sect. 7, sub-s. 1, enacts: "This Act shall apply only to employment by the undertakers as hereinafter defined, on, in, or about a railway, factory, mine, quarry, or engineering work, and to *employment by the undertakers as hereinafter defined*, on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

Sect. 7, sub-s. 2, defines the meaning of the term "undertakers" in the cases of a railway, factory, quarry, laundry, or

mine, to be those who represent the persons or bodies actually carrying on the businesses or works so described. In the case of a building the word "undertakers" is declared to mean "the persons undertaking the construction, repair, or demolition."

The 1st section, imposing upon "his employer" the liability to pay compensation to a workman, must be read by the light of s. 7, sub-s. 1, which enacts "this Act shall apply only to employment by *the* undertakers" as defined. It follows that the general words "his employer" in s. 1 must be read as "his employer being also the undertaker."

In this case the deceased man having been employed by Wright, the sub-contractor, and not by Cooper & Crane, the undertakers, his employment, although on the work undertaken by Cooper & Crane, was not, in my opinion, an employment to which alone the Act applies. It is obvious that the Legislature did not intend that such a workman, who had been exposed to equal risks and dangers with his fellow-workmen, should be excluded from the benefit of the Act: this is apparent from s. 4, which in substance provides that the undertakers of works of construction of or on buildings shall be responsible for compensation to injured workmen employed by their sub-contractors *as if they had been employed by the undertakers themselves.*

The language of this section is so important that, as I shall have to refer to it hereafter for other purposes, I have felt it will be convenient to set it out in full. Sect. 4: "Where in an employment to which this Act applies the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to

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whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to and is no part of or process in the trade or business carried on by such undertakers respectively."

The question of being ancillary is one which arose in the course of this case, and the county court judge decided it. I have not thought it necessary to notice it further now.

That the widow was entitled to compensation from Cooper & Crane, as the undertakers, seems to me to admit of no possible doubt. The judge was right, therefore, in his award of compensation against them. Even had this been open to question, no appeal against it having been made, that award was not during the argument, and cannot now be, questioned.

The real question before your Lordships arises out of the claim of Cooper & Crane for indemnity from their sub-contractor, Wright. The case in support of that claim is thus put: that by his sub-contract with Cooper & Crane, Wright became an "undertaker" equally with themselves within the meaning of the 7th section, and was in every respect under the same primary obligation to pay compensation to the widow; and that such liability was a liability imposed by ss. 1 and 7, independently of the 4th section, so as to bring him within the proviso in that section, and to give them a right to claim indemnity from him. I do not think these propositions can be maintained.

First, Wright was not an undertaker within the meaning of s. 7 of the Act. It may be that, in the ordinary common acceptation of the expression, a man may be said to undertake anything he has taken upon himself to do, with or without a contract; but this is not the interpretation contemplated by the framers of the definition clause. The Legislature in using the expression "the undertakers" has given it a limited statutory meaning, beyond which it cannot be extended. The whole Act is new to the law; it gives new rights to workmen and imposes new obligations upon employers, and, so far as it

can be, it must be strictly construed. To bring any person within the definition clause he must have undertaken some definite specific work of construction which is to form the subject of his undertaking. In this case it was for the construction *of an entire building*. Secondly, the contract of the undertaker must be with a person who has authority to employ and to authorize the undertaker to accomplish the work undertaken.

For such a work as the construction of an entire building, as is the case before us, it seems to me that two persons or sets of persons only can fill the position of the "undertakers" defined by the Act: the building owner who takes upon himself the construction of the building he requires; or the persons who, through the medium of a contract with him, engage to take upon themselves the obligation to execute that work for him. I carefully abstain from expressing any opinion touching the responsibility of a building owner who sub-divides the construction of a building among several contractors, because in this case Cooper & Crane, by their contract with him, undertook the construction from the foundations to the top of the roof. By that contract they constituted themselves "the undertakers" of the whole building within the definition in s. 7, sub-s. 2.

From that contract they could not recede or be discharged, unless with the assent of the building owner, until the building was completely constructed; and to the execution of their undertaking they were bound to bring their personal skill and experience and to exercise personal control over all the necessary operations. There was beyond this an obligation attached by the statute to their undertaking, towards every workman employed by them on that work undertaken, to pay to him, in the event of injury to him by accident, compensation according to the Act.

Neither the contractual obligation to the building owner, nor the statutory obligation to the workman, could be terminated or altered at the mere will or by any act of the undertakers. They could not assign their contract or any part of it, nor could they delegate their authority or any part of it, to another.

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It is obvious that such authority of the undertakers must emanate from the building owner himself, for no one else could confer it.

In most cases, I have no doubt, it is immaterial to the building owner whether his undertaker employs his own materials and workmen or engages another to do isolated portions of the work for him; but the building owner has no contractual relations with the sub-contractor, and can only look upon him as a mere employee of those with whom he has himself contracted. The very name "sub-contractor" imports that he occupies an inferior position to the persons who have undertaken responsibility for the whole building, and, that while they are bound to exercise control over his work, he cannot control any of theirs. Those who are pleased to do so may call him a sub-contractor or a sub-undertaker, for every day labourer undertakes to do his work, but he is not an undertaker as defined by the statute: see *Percival* v. *Garner*. (1) If undertakers could add to their numbers by sub-contracts for different parts of a building, there would be no limits to their number: this would greatly tend to defeat the object of the Legislature in its endeavour to assist the workman by pointing out specifically the persons to whom he may look for compensation.

Moreover, I can conceive none on whom the obligation to pay compensation could more reasonably rest than those who, as a matter of business, have undertaken the whole control and every responsibility attaching to the erection of the building they have undertaken to construct.

One must be careful not to be led astray by cases where the building owner, as in the case of *Mason* v. *A. R. Dean* (2), has reserved out of his contract with the undertaker the execution of a portion or portions of the building he requires to be erected, and himself contracts with some other person or persons to do such portion or portions; for there is a wide and marked difference between undertakers as defined by contracts direct with the building owners and sub-contractors with persons who are themselves already under a binding contract to undertake the

(1) [1900] 2 Q. B. 406. (2) [1900] 1 Q. B. 770.

whole building. I cannot see how the two positions of undertaker and sub-contractor with the undertaker for the same work can exist at the same time in one person, any more than that one person could at the same time be both master and servant. Yet that would be the position of Wright if, being a mere sub-contractor, he were to be treated also as the undertaker of the same work.

The language of s. 4 indicates a thorough appreciation by the Legislature of the difference between undertakers to whom the Act applies and a sub-contractor with them for the execution of part of the work. It nowhere speaks of or alludes to sub-contractors as undertakers; and if it had been intended they should be so considered with all their obligations it is impossible to suppose it would not have imposed those obligations and expressed such intention in clear, intelligible language.

In *Cass* v. *Butler* (1) the Court of Appeal expressly held that a sub-contractor with and under those who are already undertakers is not an undertaker within the meaning of the Act; and the same was held in *Cooper* v. *Davenport*. (2) These cases are in point, and I think they were correctly decided.

I must not leave this part of the case without dealing with that which was suggested as some authority for the appellants, *Hoddinott* v. *Newton, Chambers & Co.* (3) When the facts of that case are carefully considered, it will be found that it really does not in the least assist the appellants. No question as to the liability of a sub-contractor arose or was discussed in it. The facts are shortly these: An entire building had been completely erected for the General Omnibus Company by a firm of builders, who had undertaken its construction according to certain plans and specifications, and had been handed over to the company and used for some months for the purposes for which it had been built. At the end of that time the company desired to have new work of construction done in it, to give it more strength, by iron supports; the whole of that new work was undertaken by contract direct from the company by Newton, Chambers & Co., iron-workers, who were altogether

(1) [1900] 1 Q. B. 777. (2) 16 Times L. R. 266.
(3) [1901] A. C. 49.

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unconnected with the original building. In the course of such new work a workman employed on it was killed by an accident, and his widow claimed compensation from Newton & Co. One main objection was that the new work was not work of construction. This House held that it was. Another question was whether the scaffolding used in the new work was a scaffolding under the Act. There was no sub-contract at all, for Newton & Co. contracted directly with the omnibus company. I see no similarity between that case and this.

All these considerations have satisfied me that the Act by no reasonable interpretation can be held to make a mere sub-contractor an undertaker within the meaning of the Act. If I am right in this view, it is admitted that the appeal must fail; for Wright does not come within the proviso to s. 4.

But even if Wright could, contrary to my opinion, be considered such an undertaker, with an obligation equal to that of Cooper & Crane to pay compensation, I fail to see upon what ground the claim of Cooper & Crane for indemnity as distinguished from contribution can be supported in this case. The common law certainly would not enable one of two persons, each equally liable to pay statutory compensation to an injured workman, who had paid such compensation in full, to obtain indemnity against the other for the whole amount so paid. To justify such a claim some enactment by statute, or some contract between the parties, would be necessary. No such enactment or contract has been shewn to exist in this case. I do not think a doubt could be entertained that if the action was caused by the actionable misconduct of a stranger, and the injured workman elects to proceed against the undertakers, being employers, they are by s. 6 entitled to indemnity from that stranger; and so might indemnity be claimed if the accident was caused by any person, whether the employer or not, under circumstances which would have entitled the injured man to maintain an action or proceedings under the Employers' Liability Act.

It is very reasonable that it should be so, and I think this is what the Act intended by the language employed. But

there is not to be found in the Act anything expressly, nor, as I think, impliedly creating, in the possible event of there being two or more undertakers, all being equally liable for compensation, and neither guilty of actionable negligence, an obligation of indemnity in the event of some only of them being called upon to pay.

But I would point out another objection to the claim for indemnity. The proviso in s. 4 is that "*the undertakers* shall be entitled to be indemnified by any *other* person who would have been liable independently of this section." Now, if it could be truly said that Wright was one of the defined undertakers mentioned in that section, and that there was a common obligation as undertakers upon Cooper & Crane and Wright, how can it be said that Wright was some person other than the undertakers? Treating him as a mere sub-contractor, this objection could not arise.

In my opinion, Cooper & Crane were the only undertakers within the definition of s. 7, sub-s. 2, of the Act; they admit the award was right, and the burden of it must rest where it has fallen. If undertakers desire to cast the responsibility of an indemnity upon their sub-contractors, they must provide for it in their sub-contracts.

It follows that, in my opinion, this appeal ought to be dismissed with costs.

LORD DAVEY. My Lords, I will not repeat any statement of the facts of this case, which have been fully stated by my noble and learned friend opposite (Lord Brampton).

It is difficult to come to any conclusion on the subject of this appeal which is not open to criticism, and I can only say that I think the conclusion to which I have come is less open to criticism than the opposite one. There are three words used in the Act, "employer," "undertaker," and "contractor," and your Lordships are called upon to define the relative meaning in which these words are used. By s. 1 it is enacted as follows: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer

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shall, subject as hereinafter mentioned, be liable to pay compensation."

Three conditions, therefore, are necessary under this section to give the workman a right to compensation: (1.) that the employment shall be one to which this Act applies; (2.) that the injury has been caused by an accident arising in the course of the employment; (3.) that the workman shall be in the employment of the person from whom he claims compensation.

Passing by s. 4 for a moment, I come to s. 7, sub-s. 1, which provides that the Act shall apply only to employment by "the undertakers as hereinafter defined," on, in, or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined (the words are repeated), on, in, or about any building of a certain character.

We have, therefore, the employments to which the Act applies defined, and a fourth condition is added to those I have mentioned, namely, that the employer must be "the undertaker" as defined in s. 7, sub-s. 2. In that sub-section I find that in the case of a building "undertakers" means the "persons undertaking the construction, repair, or demolition." In other words, the undertakers are the persons who undertake. I take the liberty to say that this is not a definition but a mere verbal or grammatical synonym, and it affords but little assistance in construing the Act. It seems to come to nothing more than this—that the word "undertakers" in the case of a building is used in its ordinary sense, whatever that may be, as applied to construction, repair, or demolition.

It has been decided by the Court of Appeal in *Mason* v. *A. R. Dean, Limited* (1), that a person who has contracted with a building owner for part only of the work of construction is an "undertaker" within the meaning of the Act. I think this decision right, for otherwise it appears to me that a workman of such an employer would not get any compensation under the Act at all; and it is quite immaterial for that purpose what the extent or nature of his employer's contract may be,

(1) [1900] 1 Q. B. 770.

provided the work on which the injured workman is employed is within the Act. Indeed, the point is, I think, impliedly, though not expressly, covered by the decision of this House in *Hoddinott* v. *Newton*. (1) Persons who undertake a part only of the work of construction are, therefore, within the definition of "undertakers."

Nor can I find anything in the definition which requires the undertaking or engagement to be directly with the building owner, or excludes a sub-contractor to whom the contractor for the whole building has let a certain portion of the work. Such a person undertakes the work he has engaged to do as literally and truly as if his contract was directly with the building owner. Confining myself, therefore, to the definition, and independently of the 4th section, I am of opinion that in the case of a building a sub-contractor may be an undertaker within the meaning of the Act, and, consequently, a workman employed by him who has been injured by an accident in the course of his employment would be entitled to claim compensation from him. It may be that the so-called definition is so general as to include two persons, each of whom from a different aspect may be the undertaker.

Turning now to s. 4, I regard that section as a proviso on s. 1; it provides that in a certain case the workman may have a right to compensation from one who is not his employer. It is thereby enacted (in substance) that where "the undertakers as hereinafter defined"—i.e. (for the present purpose) persons who have undertaken in whole or in part the construction of any building—contract with another for the execution of any work, the "undertakers"—i.e., the said undertakers—shall be liable to pay compensation to a workman employed by the contractor.

The words describing the compensation which the undertakers are to pay to the workman are these: "Any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies."

(1) [1901] A. C. 49.

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Two cases are therefore contemplated—(1.) where compensation is payable under the Act by the contractor, i.e., the sub-contractor; and (2.) where it would be payable if he were an employer to whom the Act applies. I omit for clearness of argument compensation independently of the Act. In other words, the language of the section expressly provides for a case in which both the so-called undertakers and the sub-contractor are severally liable under the Act to pay compensation to the workman for the same injury.

The section appears to give an additional remedy to the workman, and not to restrict his right under s. 1. It may be difficult in the case of a building to suggest cases in which a sub-contractor may or may not be an employer to whom the Act applies. It would seem that a sub-contractor who has undertaken part of the work must be one or the other in all cases alike. It is, however, possible that the work undertaken by the sub-contractor might not be an employment within the meaning of the Act. But in the case of a railway, mine, or quarry (where there is a more restricted and special definition of undertakers), it is quite conceivable that a sub-contractor might not be an undertaker or employer to whom the Act applies, and probably in many cases would not be so. The language of the section is, of course, adapted to meet the case of every kind of employment within the Act.

I now turn to the proviso on which the question before your Lordships turns: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section." The meaning of this proviso is plain. Omit s. 4, and ask yourself is any other person liable (either under the Act or independently of the Act, I think it must mean). I have already expressed my opinion that, excluding s. 4 from consideration, a person who has contracted by way of sub-contract to execute work on a building would be liable, and I have pointed out that the language of the section itself contemplates that very case.

In the present appeal the liability of the appellants is not questioned. The only question is whether they are entitled to be indemnified by the respondent, and that question has been

argued exclusively on the construction of the Act. For the reasons which I have given, I think the appellants are right.

It was argued that the construction of the appellants would oblige the sub-contractor to indemnify the principal contractor, although the accident may have been caused by the default of the latter. I do not think that this consequence would follow for the reasons stated by the learned counsel for the appellants in his very able argument. I think that s. 6 would place the ultimate liability on the person in default.

I think the appeal should be allowed with the usual consequences.

LORD SHAND. My Lords, I agree with those of your Lordships who think that in this case the appeal should be allowed and the judgment of the county court judge restored, and I am content to rest my judgment on the reasons which the county court judge has himself given.

It is almost a hopeless task to attempt to reconcile or to make a consistent whole of the provisions of the Workmen's Compensation Act, 1897, which have a bearing on the question of relief which this action raises, and I do not therefore propose to go into a detailed examination of the clauses containing these provisions.

The deceased workman, Brady, was not in the employment of the appellants as a servant of theirs, yet they have been held responsible for compensation for the accident under the 4th section of the statute, which makes them "undertakers" in the same way as if the work on the building which they had undertaken to put up in its entirety had been "executed by workmen immediately employed by them"—a provision which gives a workman or his representatives greater security for the payment of compensation in case of accident than if they had to rely on the employer alone. The 4th section of the statute concludes with the words: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section"; and the question is whether, under this proviso, the appellants are entitled to the relief claimed.

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On this question I am of opinion, in the first place, that the respondent, the employer of the deceased, was himself an undertaker within the meaning of the Act, which provides by s. 7 that, in the case of a building, the term "undertakers" means "the persons undertaking the construction, repair, or demolition." It is true the respondent was a sub-contractor. He was, in my opinion, none the less undertaking the construction of part of the building—the slating—and I agree with the county court judge in thinking that this was a substantial part of the construction itself. It is clear the respondent would be an undertaker within the meaning of the Act, if his contract had been direct with the proprietor having the building erected under different contracts, and I do not think that the respondent is the less an undertaker that he was a sub-contractor for the same work, which he actually did, and in the course of which his servant, the workman, was accidentally killed. It follows that, if the action had been originally raised against the respondent alone, he would have been held liable under the 1st section of the Act. This appears to me to shew that the proviso to s. 4, which gives the right of relief in this case, applies, for the respondent's liability arises independently of that section. It has been said that the use of the word "person" in that proviso must refer to others than persons who were themselves also undertakers under the Act; but I do not read the term as qualified in any way, if only the liability arises independently of s. 4 itself.

EARL OF HALSBURY L.C. My Lords, in this case a building was being constructed for Messrs. Barker & Co. by Cooper & Crane as builders. Cooper & Crane contracted with the respondent Wright to supply slates for the roof and perform the work of completing the roof. Wright in his turn employed a labourer named Brady to carry the slates, and in the course of that employment a lift broke and caused Brady fatal injuries.

It is not denied that under the express language of the statute Brady's representatives were entitled to compensation from Cooper & Crane. They were the persons constructing

the entire building; but they had obtained a sub-contractor to construct the roof. No question, therefore, can be raised but that this is an employment to which the Act relates.

To get out for the moment of the technical language of the statute, the substance of the matter would appear to be that Barker & Co. were the persons for whom the building was being erected; Cooper & Crane were the persons contracting to build it; Wright was the sub-contractor for the roof; and Brady was employed by Wright, who was Brady's actual employer.

Now, it appears to me that the general design of the statute was to enable an injured workman, or, in the event of his death, his representatives, to make a claim for damages against the employer in the sense of a person who was constructing the building, even if he was not the immediate employer of the person injured. The theory of the Act is that, apart from any negligence or misconduct, a man employed in certain dangerous employments shall in a certain sense be insured against any accident that takes place in the course of his employment. It was probably obvious to the Legislature that, if the workman was driven to sue a sub-contractor and could not rely upon the responsibility of the person engaged to perform the whole work, a series of sub-contracts might render it practically impossible for him to ascertain the person whom he ought to sue, or, if he did, to obtain satisfaction by suing a person able to pay damages. But then the Legislature seems to have provided that though the contractor for the whole work might be sued even by a person not immediately under his control or in his employment, yet, the theory of the statute being that the employer was to be made liable, the contractor for the whole work might procure his indemnity for the liability against the actual employer of the injured workman.

Now, here of course it cannot be denied that Wright is the actual employer; and, if the design of the statute is what I have suggested, it is clear that Messrs. Cooper & Crane, who did not employ Brady at all, and are only made liable by this section of the statute in the first instance, would have their right of indemnity against the real employer; and the case is

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one actually contemplated by the statute; and so the county court judge decided.

The objection appears to be that Wright was not an "undertaker" at all. That in a popular sense he undertook the construction of the roof is admitted; that he employed Brady is admitted; that the accident happened in the course of Brady's employment under Wright in the construction of the building is also admitted; and the question is whether there is anything in the statute to shew that Wright cannot be, within the meaning of the statute, himself an "undertaker."

My Lords, the whole point seems to turn upon the question whether the persons who are described as "undertakers" must be undertakers of the whole construction; and I suppose the argument turns upon the word "the," because the interpretation section enacts that "in the case of a building" "undertaker" "means the persons undertaking the construction, repair, or demolition." If by that is meant that in order to be an undertaker the person must have undertaken the construction of the entire building, it would be an intelligible construction, though it is not the one that I should myself place upon the section. But if an "undertaker" does include a person who sub-contracts for a substantial part of a building, then I do not understand why in this case Wright was not an undertaker in the ordinary meaning of words. The ordinary particulars by which a person might be described as an undertaker are all fulfilled in Wright's case. Wright was certainly an undertaker; he undertook a substantial part of the work, namely, the roof. He had the control and management of that part of the work; he employed Brady as a labourer in that form of employment; and I do not understand why it is suggested that he was not an undertaker, unless it is suggested, as I have said, that in order to be an undertaker he must take upon himself the entire contract that has been made by another person. It seems to me that that would be an unreasonable construction of the statute, which in its language is sufficiently clear. The language does not appear to support such a construction.

To apply, therefore, the language of the statute itself to the

facts of this case, the employment here of Cooper & Crane was an undertaking by them, and they are in their turn undertakers. But they contracted with Wright for the execution of certain work, namely, the roof. But, by the language of the statute, they are made liable if such work was executed by workmen not immediately employed by them, but on the work for which they contracted, and they must pay compensation under the Act to those workmen in respect of any accident arising out of and in the course of such employment. That is the liability imposed upon Cooper & Crane; nor have they denied their liability.

But while providing that the building contractors shall be liable, s. 4 goes on to provide that they are "entitled to be indemnified by any other person who would have been liable independently of this section." Now, one asks oneself the question, Who are the persons who "would have been liable independently of this section"? It is to be observed that it says, not "independently of the statute," but "independently of this section"—that is, the section which places upon some other superior contractor the responsibility in regard to workmen employed by the sub-contractor. Now, I am unable to answer that question otherwise than in one way, because, "independently of this section," Wright would have been the employer; Wright would have been engaged in the erection of a building to which the Act applies, and the workman is injured in the course of performing duties imposed upon him by Wright. Therefore, "independently of this section," it is clear to my mind Wright would have been liable under the general provisions of the statute; but this section in the first instance shifts the responsibility on to the contractor for the whole building. Whether the enactment is felicitously worded or not, when one looks at the section and proviso together, I think it can hardly be doubted that the meaning of it was that where part of the work is let out, although the builder of the entire structure shall in the first instance be liable for the injury to the workman employed by the sub-contractor, nevertheless, as he is not the actual employer, the builder who is thus made liable for injuries to a workman not employed by

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him shall have a right of indemnity against the actual employer, between whom and himself there was no relation except that of contractor.

I doubt whether the attempted definition of the word "undertaker" has added anything to the interpretation of the statute.

Cooper & Crane undertook the whole building. Wright undertook the construction of the roof. It is in the course of the construction of the roof that Wright's labourer is injured; and if it is contended that the latter words of s. 4 do not apply, this consequence would follow—that Wright, apart from that section, would not be liable to Brady, although Brady was employed by him and was engaged in a building operation; and if the argument is right, inasmuch as, apart from that section, Cooper & Crane would not be liable at all, the workman would have no remedy whatever; so that, though Wright should be employing a man in a trade considered dangerous by the Act, and though in the course of that employment Wright's labourer was injured, the labourer would have no remedy.

It seems to me that this would reduce the legislation to an absurdity, and I cannot think that the Legislature could have intended such a result. I am not quite certain in what sense my noble and learned friend Lord Brampton used the phrase "the building owner." I do not understand whether he means a person who wants to have a building built for him, or whether he means a man who does in fact himself undertake to build and takes part in the actual construction of the building. If the latter is what is meant, then I can understand that he might properly be described as an undertaker. But if my noble and learned friend means only an owner who lets out to different persons different portions of the construction, then according to the argument there is no person who can properly be described within the meaning of the Act as an undertaker. There was no one who undertook the construction of the whole building; the owner is not in any sense the undertaker; there are different contractors who undertake to construct each a different substantial part of one building; and then, suppose this very accident occurs, who is liable? No one, if the objection

which I have referred to is a good one; and yet a man who is by the hypothesis expressly within the language of the statute, who is engaged in a work which the Legislature has regarded as dangerous, would have no remedy against any one. I think that cannot have been intended.

Therefore, my Lords, I think the judgment of the Court below is wrong, and I move your Lordships that it be reversed, with costs.

Earl of Halsbury L.C.

Order of the Court of Appeal reversed and order of the county court judge restored with costs both here and below.

Lords' Journals, May 16, 1902.

Solicitors: *Mason, Edwards & Masons, for R. H. Beaumont, Nottingham; Mackrell, Maton, Godlee & Quincey.*

[HOUSE OF LORDS.]

FARQUHARSON BROTHERS & CO. . . APPELLANTS;

AND

C. KING & CO. . . . . RESPONDENTS.

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Fraudulent Conversion of Goods—Estoppel—Loss to one of two Innocent Persons through Fraud of a third Person—Power of Disposition of Goods given to a Clerk—Sale of Goods Act, 1893 (*c.* 71), *s.* 21.

The appellants, who were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold timber of the appellants to the respondents, who knew nothing of the appellants or of the clerk under his real name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders to the respondents:—

Held, that the appellants, not having held out the clerk to the respondents as their agent to sell to the respondents, were not estopped from denying the clerk's authority to sell; that the clerk, having no title

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or apparent authority himself, could not give the respondents any title; and that the appellants were entitled to recover from the respondents the value of the timber.

The decision of the Court of Appeal, [1901] 2 K. B. 697, reversed, and the judgment of Mathew J. restored.

THE appellants were timber merchants and warehoused in the Surrey Commercial Docks the timber which they imported. In 1895 they wrote to the secretary of the dock company: "We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of and in addition to the other members of the firm, and inclose our written authority for same." The inclosed authority ran thus: "We hereby authorize you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined, the company acting also on our signature as before. This authority is to remain in force until expressly revoked in writing by us." Capon was a confidential clerk of the appellants who had authority to sell to certain recognised customers of the appellants timber at prices and up to limits fixed by the appellants, and occasionally to make other sales.

In 1896 Capon began a series of frauds. He obtained an address at Battersea under the name of Brown, and from that address and under that name offered to sell and sold to the respondents, who were packing-case manufacturers, parcels of the appellants' timber and appropriated the proceeds. In these sales he represented himself as a commission agent acting on behalf of Messrs. Bayley, fire-escape makers. He carried out the sales by signing orders in his own name to the dock company to transfer or deliver timber to the order of Brown, the timber being transferred in the dock company's books into the name of Brown. Then in the name of Brown he signed orders to the dock company to transfer or deliver the timber to the order of the respondents. In the appellants' stock-books Capon made alterations and false entries of fictitious sales so as to account for the diminution of stock. The respondents knew nothing of the appellants, and nothing of Capon except under the name of Brown. They bought in good faith in

ignorance of the frauds. The frauds having been discovered in 1900, the appellants brought an action against the respondents claiming delivery of the timber or its value. The action was tried before Mathew J., who left to the jury the question, Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants? The jury answered, No. The learned judge refused to put to the jury a question pressed upon him by the defendants' counsel, namely, whether the plaintiffs had by their conduct enabled Capon to hold himself out as owner of the goods or as entitled to sell them. Upon the finding of the jury Mathew J. entered judgment for the plaintiffs for 1200*l.* The Court of Appeal (A. L. Smith M.R. and Vaughan Williams L.J., Stirling L.J. dissenting) reversed that decision and entered judgment for the defendants. (1) Against this decision the present appeal was brought.

The respective contentions of the plaintiffs and defendants are very fully and forcibly expressed in the report below. (1) The following is an outline of the arguments in this House.

June 13, 16. *Asquith*, *K.C.*, and *Danckwerts*, *K.C.* (*W. Whately* with them), for the appellants. The Court of Appeal held that the plaintiffs were estopped from denying Capon's title to sell the timber because by their conduct they enabled him to hold himself out as the owner or as entitled to dispose of it. But to raise an estoppel against the plaintiffs they must have done some act to mislead the defendants, or must have omitted some act which it was their duty towards the defendants or the world at large to do, such act or omission being the proximate cause of the loss to the defendants. Mere negligence in the custody of the goods is not enough. The defendants were not misled by anything done by the plaintiffs. They were not customers of the plaintiffs, and did not even know them. They knew nothing of Capon under that name, or of the authority given him to sign transfer and delivery orders in pursuance of authorized sales. They knew Capon only under the name of Brown at an address in Battersea, and supposed him to be an agent acting for Bayley, but made no inquiry of

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Bayley or any one else. To carry out his frauds Capon stole the timber and forged Brown's indorsements and signatures to the transfer and delivery orders. He gave no better title to the defendants than he had himself. If the decision of the Court of Appeal is right, there was no necessity for the Factors Acts.

[They cited *Lamb* v. *Attenborough* (1); *Cole* v. *North Western Bank* (2); *Johnson* v. *Crédit Lyonnais Co.* (3); *Brocklesby* v. *Temperance Building Society* (4); and the Sale of Goods Act, 1893 (c. 71), s. 21, sub-s. 1.]

Lawson Walton, K.C., and *Cababé*, for the respondents. The respondents do not rely on the Factors Acts. The question which ought to have been left to the jury was whether the plaintiffs had by their own conduct enabled Capon to hold himself out as owner or as entitled to sell: *Dyer* v. *Pearson* (5); *Henderson & Co.* v. *Williams* (6), where Lord Halsbury quoted with approval the saying of an American judge that "when one of two innocent persons must suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud." It was an indiscretion of the plaintiffs to give their clerk authority to sign transfer and delivery orders and thus enable him to complete fraudulent sales by passing the possession of and the property in the timber to innocent bonâ fide purchasers. The plaintiffs put him in the position of the true owner, and by this conduct held him out to the world as the true owner or as entitled to sell, having the disposing power, or the dominion over the goods. Thus they come within the words of the Sale of Goods Act, 1893, and are "precluded from denying the seller's authority to sell." Through the dock company they misled the respondents.

[They also cited *Ramazotti* v. *Bowring* (7), *Meggy* v. *Imperial Discount Co.* (8), *Babcock* v. *Lawson* (9), *Vickers* v. *Hertz* (10), and all the cases cited in the Court of Appeal.]

(1) (1862) 1 B. & S. 831.
(2) (1875) L. R. 10 C. P. 354.
(3) (1877) 3 C. P. D. 32.
(4) [1895] A. C. 173.
(5) (1824) 3 B. & C. 38, 42; 27 R. R. 286.
(6) [1895] 1 Q. B. 521, 529.
(7) (1859) 7 C. B. (N S.) 851.
(8) (1878) 3 Q. B. D. 711, 716.
(9) (1879) 4 Q. B. D. 394.
(10) (1871) L. R. 2 H. L., Sc. 113.

June 17. EARL OF HALSBURY L.C. My Lords, in this case I hesitate to speak all that is in my mind out of respect to the learned judges who have taken a different view; but for that I should have said that this was a particularly plain case in which no difficulty whatever arises. I think it might be stated compendiously in two sentences. A servant has stolen his master's goods, and the question arises whether the persons who have received those goods innocently can set up a title against the master. I believe that is enough to dispose of this case.

That it was a stealing there cannot be the smallest doubt, and indeed I feel great hesitation in treating seriously the argument that it was not. What possible difference is there between what was done here by Capon and the act of taking a pocket handkerchief out of a man's pocket by a thief in the street? The man who steals is a servant: his possession is the possession of the master. It is not denied that he had no actual authority to dispose of these goods, and because by a circuitous process he allows an innocent agent (for all the persons who acted under his directions were perfectly innocent) to remove the goods from the place where they had been stored by the master, that, forsooth, is said not to be an asportavit! Why not? Assuming always the element of fraud, the intention to commit a crime, which is not denied, what element is there wanting to make that a stealing? I confess I am puzzled at the notion that anybody could entertain the smallest doubt in the world that that was a stealing. (1)

Well, if it was a stealing, how has the person who has received the goods acquired a right to those goods which, it is equally not denied, originally belonged to the appellants in this case? When has the property been changed, and by what circumstances? It is impossible, I think, to answer that question except in one way. There has been no property changed: the thief could give no title whatever. The circumstances of this case shew conclusively that there is nothing to prevent this

(1) [It would seem from the statement of the facts that Capon never had custody of the goods, never took manual possession of them, and did not acquire possession by constructive delivery from the dock company, who never assented to hold the goods on his account. *Ideo quære.*—F. P.]

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being a theft, and, it being a theft, the thief could convey no title. That disposes of the case.

My Lords, but for the respect I entertain for the learned judges who have taken a different view from myself, I should leave the case there, because I think it is too plain for argument; but a great deal has been said upon the subject of the right arising from estoppel. I really do not understand what estoppel has to do with this case. The mode by which the goods were removed and the asportavit incident to the felony accomplished was, as a matter of fact, carried out by the innocent act of the dock company; but it is a mistake to talk of the relations between the dock company and the appellants here as if there was any question of estoppel. It would not be true to say, even as regards the dock company, that there was an estoppel: there was no estoppel at all. Estoppel arises where you are precluded from denying the truth of anything which you have represented as a fact although it is not a fact; but no such question arises here. All that the dock company did they were expressly authorized to do by the appellants; there would not, therefore, be an estoppel as between them and the dock company at all; it would be that they had acted in pursuance of the real and direct authority of the appellants, and, after the letter of authorization, what they did was expressly authorized by the appellants. If it could be argued here that the appellants had represented their clerk Capon to be invested with what, over and over again with a degree of reiteration somewhat wearisome, last night we heard called a "disposing power," "perfect dominion," and "control," and such words as those, which are ambiguous in themselves unless you explain what the disposing power and what the dominion and control mean—I say, if they had represented their clerk Capon to be invested with disposing power, and (note the importance of the next sentence) if anybody, supposing Capon to be invested with that power, had acted upon it to his own prejudice, then undoubtedly estoppel would have arisen; the person who had improperly and negligently allowed Capon to be apparently so invested with authority would be estopped from denying that Capon had authority.

So far the matter would be quite clear; but when we come to look at what the facts of this case are, what in the world has that to do with the question that arises here? Capon was unknown; the appellants were unknown; nobody dreams of suggesting that the respondents here acted upon the faith of Capon being invested with that authority. They never heard of Capon, they never heard of the appellants, but the clerk who has committed the fraud, ingeniously availing himself of his power of signing orders for delivery, gave a delivery order to change the name in which the goods were stored in the dock company's books to the name of Brown. Professing to be Brown, and professing to act on behalf, not of the appellants, but of a third person named Bayley, he procures the removal of these goods by innocent agents, as I have described them, under the authority of Brown, he having fraudulently transferred the goods in the dock company's books from the name of his master to that of Brown—a fictitious person—and Brown in his turn procures these goods to be delivered to the present respondents; and, forsooth, it is said that that establishes an estoppel. My Lords, I am bewildered at the absurdity of such a suggestion; I really do not understand in what possible way it can arise. That, I should have thought, was quite enough to dispose of this case.

My Lords, so far as I am concerned I really am not concerned to defend, if it were attacked, the language which I appear to have used in *Henderson* v. *Williams*. (1) I adhere to every word of the judgment I then delivered. It is not a question of whether I am prepared to affirm the words which were quoted or not. I speak of it, I hope, impartially; if I thought the words were incautious I should not hesitate to correct them now; but I do not know now what it is I am supposed to have said that can have led to this misapprehension. I believe the proposition of law which I then gave is accurate, and I am prepared to adopt it; but what application has it to this case? Curiously enough, the only passage which has been assailed as giving rise to the difficulty here is not my own language at all, but the language of an American

(1) [1895] 1 Q. B. 521.

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judge, though it is true I quoted it with approval. Let us see what the language is: I believe it to be accurate. I observe that a few words seem to have been omitted from the consideration of the learned judges who commented on this matter. The language of the learned judge (Savage C.J.) quoted by me is this: Speaking of a bonâ fide purchaser, who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." Those words "who by his indiscretion" appear not to have made much impression upon those who were commenting upon this matter. What indiscretion did the appellants here commit? They entrusted their clerk with the delivery orders. It is said that in some exceptional cases he was allowed to make a contract; but what has that got to do with it? No one knew that outside the firm themselves; and you might just as well say in the case of a shopman in a furniture broker's shop, that because he is there, because he habitually delivers goods to the orders which his master receives, that gives him to all the world the power of giving a title if he steals his master's tables and chairs and delivers them to somebody else.

My Lords, I confess I am a little surprised that two of the learned judges seem to be under the impression that my proposition, quoted, as I have said, from an American judge, was that any person who has enabled another by any means to commit a fraud must be the person to suffer when two innocent persons are in question. Of course it depends on the sense in which you are to understand the word "enabled." As I put it to the learned counsel yesterday, in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop, acting in breach of any duty? Does he owe any duty to all the world, as is suggested here, to prevent people taking advantage of his selling pistols or daggers in his business, because he does in

one sense enable a person to commit a crime? It seems to me that the moment you analyze what is intended by this argument the answer is plain; and when you analyze what is the only function which this man Capon was entitled to perform it is simply this—that he was a delivery clerk. But, say the learned counsel for the respondents, not only was he a delivery clerk, but sometimes he had power and authority to make a contract. Suppose he had—what then? Was anybody misled by that? Did anybody act upon that belief? No one. Therefore, any notion of anybody acting upon something that was held out and represented is entirely out of the question.

My Lords, it appears to me when one analyzes the matter it comes to this broad proposition—that because you have given authority to your clerk to deliver goods, for that is the sole thing that could be established by looking at the books either of the firm or of the dock company, therefore, if any person in the employment of that master takes advantage of that for the purpose of committing a felony, thereupon that person is invested with the power to give the receiver a good title.

My Lords, I think the state of the law would have been perfectly clear without it; but the Sale of Goods Act has disposed of any such question, because it says, "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying" —what?—"the seller's authority to sell." Now, where comes in here the operation of that saving clause? What authority was there to sell? None. What representation was there of Capon's authority to sell? None. Therefore when one analyzes this case the two sentences with which I commenced my judgment appear to me to entirely dispose of it. This was a theft, and the thief could give no better title than he himself had, which was none. Therefore, it seems to me luce clarius that the appellants are entitled to succeed, and I move your Lordships to reverse the order appealed from with costs.

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LORD MACNAGHTEN. My Lords, I am of the same opinion. After what has fallen from my noble and learned friend on the Woolsack, I am almost ashamed to trouble your Lordships with any observations of my own. But the circumstances are peculiar in one point of view. I cannot remember any case in which the wealth of learning and argument was so far beyond the value of the poor and commonplace material on which it has been expended. And, besides, the question is not unimportant; the decision under appeal, if it could be supported, would have very far-reaching, and, in my opinion, very pernicious consequences.

Vaughan Williams L.J. expresses an opinion to the effect that the case is difficult. The very learned judge who differs from him in the result agrees with him so far. My Lords, speaking for myself in the view I take of it, I must say that I cannot imagine a plainer or a simpler case than this.

Messrs. Farquharson Brothers & Co. were timber merchants in a large way of business with a turnover exceeding 200,000*l.* a year. They had a confidential clerk called Capon, whom they trusted implicitly. A short time ago they discovered that this man had been robbing them for years, stealing small lots of their timber from time to time, passing the timber out of their names in the docks by means of a written authority they had given him, and disposing of it for his own benefit. They trace the stolen timber to the hands of Messrs. King & Co. They demand restitution or compensation. The demand is refused; and then this action is brought.

What is the defence? Not that the goods were bought in market overt, though that would be no defence now after the conviction of the thief. Not that Messrs. Farquharson led them to believe that Capon had their authority to sell what they supposed they bought or misled them in any way. That defence is out of the question. They never imagined that they were dealing with Messrs. Farquharson or buying Messrs. Farquharson's goods. They never even dealt with Capon to their knowledge. They never dealt with him in his own name and in his proper person. They dealt with a phantom broker, an imaginary being created, animated, and worked by Capon

for his own purposes under the plain and unpretentious name of Brown. And from this Brown, whom they never saw in the flesh, about whom they never made a single inquiry, they supposed they bought this timber. Whether Capon, who has apparently been convicted of forgery, could have been convicted of larceny or not in this case, it seems to me absurd to suppose that by this juggle of Capon's, all sham and pretence so far as he was concerned, the property in the stolen timber passed to Messrs. King & Co.

If it were permissible it would be interesting to inquire which of the two firms parties to this litigation was the more blameworthy in a moral point of view. The plaintiffs trusted a man whom they had long known and whom they believed to be honest. The defendants trusted a man they had never seen, whom a breath of suspicion and the most ordinary inquiries would have unmasked. But we have nothing to do with this matter, though it does seem to have entered into the consideration of the Court of Appeal.

The real defence is a singular one. It comes to this: The defendants say to the plaintiffs, "You, Messrs. Farquharson, have conducted your business in such an unbusinesslike way that you ought not to have your own goods back again. This misfortune common to you and to us is all your fault. By your foolish confidence in Capon, and by the written authority you gave him, you 'enabled' him to commit this fraud upon us. And so Ashhurst J.'s famous dictum comes in and you must sustain the loss."

This defence, in my opinion, has no foundation in principle or authority. To try the principle, take a common case—a case which everybody understands. Nothing is better settled than this, that if a person buys a chattel and it turns out that the chattel was found by the person who professed to sell it, the true owner can recover his property, unless there has been a sale in market overt. The right of the true owner is not prejudiced or affected by his carelessness in losing the chattel, however gross it may have been. If I lose a valuable dog and find it afterwards in the possession of a gentleman who bought it from somebody whom he believed to be the owner,

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it is no answer to me to say that he never would have been cheated into buying the dog if I had chained it up or put a collar on it or kept it under proper control. If a person leaves a watch or a ring on a seat in the park or on a table at a café and it ultimately gets into the hands of a bonâ fide purchaser, it is no answer to the true owner to say that it was his carelessness and nothing else that enabled the finder to pass it off as his own. If that be so, how can carelessness, however extreme, in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him?

Nor is the case without authority. In the *Bank of Ireland* v. *Evans' Trustees* (1), in this House, the trustees, who were a corporate body, called upon the bank to replace stock sold under a forged power of attorney bearing the genuine impression of their corporate seal. The defence was that the carelessness of the trustees in the custody of their seal enabled their clerk to impose on the bank, and disentitled them to relief. The judges were consulted. Their unanimous opinion, which this House adopted, was delivered by Parke B. He thought that the negligence, if there was negligence, in the custody of the seal was only remotely connected with the transfer which the bank set up as good against the trustees; and then he proceeds in these words (2): "If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?"

A somewhat similar contention was raised in the more recent case of *Scholfield* v. *Lord Londesborough*. (3) It was

(1) (1855) 5 H. L. C. 389. (2) 5 H. L. C. at p. 410.
(3) [1896] A. C. 514.

argued (and the argument found favour with some judges) that everybody who accepts a bill of exchange owes a duty which was defined as "the duty not to be negligent as to the form of the bill." That argument was rejected in this House. But in rejecting it both the Lord Chancellor and Lord Watson made observations of much wider application. The Lord Chancellor said (1): "I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime. A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket, but could recover against a bonâ fide purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief." And Lord Watson in his judgment says (2): "It is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate."

My Lords, the rules of law applicable to this case are in my opinion well settled. And I would only venture to remind your Lordships of an observation made by Lord Cairns in this House (3) to the effect that in cases of this sort, where your Lordships have to perform the disagreeable duty of determining which of two innocent parties is to suffer by the fraud of a third, all your Lordships have to do is to apply the settled and well-known rules of law and apply them rigorously.

LORD SHAND. My Lords, in the course of the argument I felt that a difficulty arose in determining whether the principle in the *Brocklesby Case* (4) ought not to receive effect in favour of the respondents; for undoubtedly Capon had a general authority from the plaintiffs, which gave him power to transfer

(1) [1896] A. C. at p. 521.
(2) [1896] A. C. at p. 537.
(3) *Cundy* v. *Lindsay*, (1878) 3 App. Cas. 459, at p. 463.
(4) [1895] A. C. 173.

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in the dock company's books the timber which the respondents bought, and the limitation of that authority to certain sales of a restricted character was unknown to the purchasers of the timber. But, on the other hand, I have come to the conclusion without difficulty that the principle of this case does not apply, for the reasons which have been fully stated by the Lord Chancellor, and because no representation of Capon's authority was made to the respondents. Indeed the respondents were not even acquainted with the fact that they were dealing with Capon at all, but thought they were dealing with a fictitious person whom he named Brown. On that ground, therefore, I am of opinion that the argument so much pressed by the respondents fails.

But, my Lords, I am further of opinion with your Lordships that the circumstances of the case shew that this was really a theft on the part of Capon, and upon that second ground also I think that the order ought to be reversed. By putting the goods in a fictitious name Capon got them transferred to himself under that fictitious name, and thereupon he disposed of the goods. In so doing I think that that was a case of fraudulent appropriation, and really a theft of the goods, and that the property in the goods therefore never passed to Capon or to any one who purchased from him. On these grounds I concur with the motion which has been proposed.

LORD ROBERTSON. My Lords, it seems to me that the facts of this case hopelessly shut out the respondents from the legal principles which they invoke. When it is remembered that the respondents never heard of the appellants in connection with these purchases during their whole course; that they never knew of Capon's existence; that, instead of dealing with Capon as the agent of the appellants, they dealt with Brown as the agent of Bayley; that the right they expected to acquire was the right of Bayley and not the right of the appellants at all, it is difficult to see how the cases cited have any bearing on the question. These things have ultimately reduced the respondents to relying on the fact that they paid their money in consequence of the dock company registering a transfer in

their favour executed by Capon in his character of Brown, the previous transfer having been executed in favour of Brown by Capon purporting to act in his quality of clerk of the appellants. This recognition was given by the dock company to the transfer in favour of Brown in accordance with the general request of the appellants to the dock company to honour Capon's transfers. The place occupied therefore by this request to the dock company is merely that it was a causa sine quâ non and not the causa causans of the respondents being involved.

I think the respondents attach inordinate importance to this fact, and that the words "disposing power" are inapplicable. The authority conferred on Capon is not contained and does not purport to be described in the letter addressed to the dock company. That letter was in fact and of course a great deal broader than the authority of the servant, for no public company would undertake to discriminate among orders or to supervise the exercise by a servant of his master's delegated authority. Thus the dock company were clearly bound to recognise the transfer by Capon to Brown, and yet the transfer to Brown was a fraud.

This seems to me to be exactly the case of a servant having unrestricted access to goods for his master's purposes and using that access to steal the goods and sell them. In the one case as in the other the innocent purchaser parts with his money on getting the goods, and does so misled by the fact of possession being given owing to the dishonest servant having access to the goods. And, unless the master is bound to all the consequences of the servant's access, I can see no ground for the respondents' argument on "disposing power."

Mr. Lawson Walton, whose faith in the "disposing power" was less absolute, endeavoured to piece on to it the circumstance that Capon had a limited authority to sell. But here again the facts preclude the respondents from any right to found on this circumstance, for in the matters now in question that power was never exercised and never known. It would be extravagant to hold that in these sales of Bayley's goods by their agent Brown, of Battersea Rise, we are to recognise a mere excess of Capon's authority. The existence of that

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limited authority had nothing whatever to do with the purchases, and did not directly or indirectly facilitate the frauds. The respondents were wholly ignorant alike of the authority and the person authorized, and consequently drew no inferences from the exercise of the authority. The learned counsel frankly avowed that he had no case of holding out; and this being so, I do not think that the limited authority actually held by Capon can do the respondents any good. The case ultimately rests on the fact that, as the appellants' servant, Capon had the means of making away with their goods if he chose to steal them; and that is an impossible ground of judgment.

LORD LINDLEY. My Lords, I also think this case is extremely plain when it is understood.

Capon sold the plaintiffs' timber without their authority, and sold it to the defendants. The defendants honestly bought the timber, and they had no notice that Capon had no right to sell it; but there was no sale in market overt, and the Factors Acts do not apply. The mere fact, therefore, that the defendants acted honestly does not confer upon them a good title as against the plaintiffs, the real owners of the timber. The plaintiffs are entitled to recover the timber or its value, unless they are precluded by their conduct from denying Capon's authority to sell. (Sale of Goods Act, 1893, s. 21, and see s. 61.) Capon sold under the name of Brown, representing himself to be an agent of some persons named Bayley, who were well known in the timber trade. The defendants bought on the faith of his being what he pretended to be. What have the plaintiffs done which precludes them from denying, as against the defendants, Capon's right to do what he pretended he was entitled to do? Putting the question in another form: What have the plaintiffs done to preclude them from denying, as against the defendants, Capon's right to sell to them? To answer those questions it is necessary to consider what the plaintiffs did.

Capon was the plaintiffs' confidential clerk; they gave him a limited power of sale to certain customers, and a general written authority to sign delivery orders on their behalf; and

the plaintiffs sent that written authority to the dock company which stored the plaintiffs' timber. This authority would, of course, protect the dock company in delivering timber as ordered by Capon, however fraudulently he might be acting, if the dock company had no notice of anything wrong. By abusing his authority Capon made timber belonging to the plaintiffs deliverable by the dock company to himself under the name of Brown. In that name he sold it, and procured it to be delivered to the defendants. What is there here which precludes the plaintiffs from denying Capon's right to sell to the defendants?

What have the plaintiffs done to mislead the defendants and to induce them to trust Capon? Absolutely nothing. The question for decision ought to be narrowed in this way, for it is in my opinion clear that, when s. 21 of the Sale of Goods Act has to be applied to a particular case, the inquiry which has to be made is not a general inquiry as to the authority to sell, apart from all reference to the particular case, but an inquiry into the real or apparent authority of the seller to do that which the defendants say induced them to buy.

It was pointed out by Parke J., afterwards Lord Wensleydale, in *Dickinson* v. *Valpy* (1), that "holding out to the world" is a loose expression; the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it. The same principle must be borne in mind in dealing with cases like the present. I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

It was urged that the dock company were led by the plaintiffs to obey Capon's orders and to deliver to Brown, and that the defendants were induced by the dock company to deal with Brown, or at all events to pay him on the faith of his being entitled to the timber; so that in fact the plaintiffs, through the dock company, misled the defendants. This is ingenious but unsound. Except that delivery orders were sent in the

(1) (1829) 10 B. & C. at p. 140; 34 R. R. 355.

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name of Brown to the defendants, and were acted on by the dock company, there is no evidence connecting the dock company with the defendants in these transactions; and the answer to the contention is that the defendants were misled, not by what the plaintiffs did nor by what the plaintiffs authorized the dock company to do, but by Capon's frauds.

It is, of course, true that by employing Capon and trusting him as they did the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach. But if the word "enable" is used in this wide sense, it is clearly untrue to say, as Ashhurst J. said in *Lickbarrow* v. *Mason* (1), "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Such a doctrine is far too wide; and the cases referred to in the argument and commented on by Vaughan Williams L.J. shew that it cannot be relied upon without considerable qualification.

Lamb v. *Attenborough* (2), which is very like this, is a good illustration of the unsoundness of the doctrine in question if taken literally. *Johnson* v. *Crédit Lyonnais Co.* (3) is another illustration to the like effect. So far as I know, the doctrine has never been judicially applied where nothing has been done by one of the innocent parties which has in fact misled the other: see Story on Agency, s. 133.

In *Vickers* v. *Hertz* (4) the defendant acted on the faith of a document signed by the plaintiff. So in *Babcock* v. *Lawson*. (5) In *Brocklesby* v. *Temperance Building Society* (6) the bank advanced money on the faith of the document signed by the plaintiff, and the defendants who had paid off the bank were entitled to the benefit of the bank's security. In *Henderson* v. *Williams* (7) the defendant acted on orders given by the owner

(1) (1787) 2 T. R. 63; 1 R. R. 425.
(2) 1 B. & S. 831.
(3) 3 C. P. D. 32.
(4) L. R. 2 H. L. Sc., 113.
(5) 4 Q. B. D. 394.
(6) [1895] A. C. 173.
(7) [1895] 1 Q. B. 521.

of the goods; the action was defended on his behalf, and he had entrusted the goods to Fletcher, to whom the defendant had attorned. These cases do not really assist the defendants. Nor does *Dyer* v. *Pearson*. (1)

In the present case, in my view of it, Capon simply stole the plaintiff's goods and sold them to the defendants, and the defendants' title is not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell.

The question which the defendants pressed Mathew J. to leave to the jury, and which the late Master of the Rolls and Vaughan Williams L.J. thought ought to have been left to them—namely, "Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the goods or as having the power to dispose of them?"—would, in my opinion, have been seriously misleading unless accompanied by explanations which would have taken out of it the element of error introduced by the word "enable." I feel very strongly the observation that if the defendants are right the Factors Acts would never have been wanted.

In my opinion, Mathew J. was quite right in leaving to the jury the question as he framed it: "Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants?" The verdict is unimpeachable, and it is fatal to the defendants.

The appeal ought to be allowed with costs both here and below.

Order of the Court of Appeal reversed and judgment of Mathew J. restored with costs here and below.

Lords' Journals, June 17, 1902.

Solicitors: *Ward, Perks & McKay; Anning & Co.*

(1) 3 B. & C. 38; 27 R. R. 286.

[HOUSE OF LORDS.]

H. L. (Sc.) 1902 *May* 15.

THE LORD ADVOCATE . . . . . APPELLANT;

AND

STEWART AND ANOTHER. . . . . RESPONDENTS.

Revenue—Entailed Estate—Money held in Trust to Purchase Lands in Scotland or England to be entailed—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 23, *sub-ss.* 14, 16.

By s. 23, sub-s. 14, of the Finance Act, 1894, "The expression settled property shall not include property held under entail." By sub-s. 16, "where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without" . . . . consent, "settlement estate duty as well as estate duty shall be paid in respect of such estate":—

Held, that money vested in trustees for the purpose of purchasing at their discretion lands in Scotland or in England to be strictly entailed is not "entailed estate" within the meaning of the Finance Act, 1894, and is not liable to "settlement estate duty."

Semble, per Lords Macnaghten, Brampton, Robertson, and Lindley, that if the money had been directed solely to be laid out in land in Scotland to be strictly entailed according to the Scottish law of entail, the money, in the sense of the Finance Act, 1894, would be "entailed estate," and therefore liable to "settlement estate duty."

APPEAL from the First Division of the Court of Session as the Court of Exchange in Scotland (1) reversing a judgment of the Lord Ordinary (Lord Stormonth-Darling).

The appellant was the Lord Advocate, who on the part of the Board of Inland Revenue claimed "settlement estate duty" on a balance of 60,000*l.* legacy money directed to be laid out in the purchase of land and strictly entailed. The respondents were Sir Mark John McTaggart Stewart, Bart., and another, trustees of the late James Sprot.

By trust disposition dated May 17, 1879, James Sprot conveyed his whole estate heritable and movable, excepting his entailed estate of Spott, for certain purposes. By the last purpose he directed his trustees to hold and apply 150,000*l.*—which by codicil was reduced to 100,000*l.*—of the residue of his estate in the purchase of land in Scotland, to make up titles in

(1) (1901) 3 F. 440.

their own name, and then to execute a deed of strict entail of the purchased land in favour of his nephew Edward William Sprot and the heirs male of his body, and whom failing to certain substitutes.

By a codicil of the same date as the trust disposition the trustees were empowered, if in their discretion they considered it desirable, to purchase land in England in place of in Scotland for the purpose of being entailed on the same series of heirs, and in that event the trustees were directed to have the lands entailed according to the law of England under the advice of English counsel. Pending the purchase of land, or while the land was held by the trustees before the execution and delivery of a deed of entail, the income and rents were to be paid by the trustees to Edward William Sprot, whom failing to the substitute of entail who would have been entitled to the rents had the deed of entail been executed.

The testator died on July 5, 1882. In pursuance of the directions contained in the last purpose of the trust disposition, the trustees purchased the estate of Drygrange, in the counties of Roxburgh and Berwick, with part of the 100,000*l.* held by them for the purpose of such a purchase, and they conveyed the lands to Edward William Sprot and to the substitutes of entail by disposition and deed of entail dated January 28 and 2nd and 6th of February, 1888. Edward William Sprot of Drygrange died on February 1, 1898. The balance of the 100,000*l.* remaining unexpended was invested in 3 per cent. Metropolitan Consolidated Stock of the value of 59,933*l.*, and is still held in trust and invested in that form of security.

On the death of Edward William Sprot, his son Edward Mark Sprot succeeded as heir of entail to the lands of Drygrange, and to the income of the moneys held by the trustees for the purchase of lands to be entailed as directed. Estate duty on Drygrange and on these moneys was paid on February 6, 1899, and settlement estate duty on Drygrange on September 15, 1899. Edward Mark Sprot is not entitled to disentail the entailed estate—neither the lands nor the money—without consent, and he is not the only heir of entail in existence.

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The respondents claim to be repaid the estate duty paid on the 60,000*l.* The question in this appeal relates in form to the payment of "settlement estate duty."

The First Division of the Court of Session, reversing the decision of the Lord Ordinary (Lord Stormonth-Darling), held that the 60,000*l.* was not "entailed estate" in the sense of s. 23, sub-s. 16, of the Finance Act, and was not liable as such to "settlement estate duty." (1)

Feb. 7, 10. *Scott-Dickson, Solicitor-General for Scotland* (with him *Young*) (both of the Scottish Bar), for the appellant. The question is whether this money is "settled land," as maintained by the respondents, or "entailed estate" in the sense these words are used in the Act of 1894, as the appellant submits it is. Sect. 23 of the Finance Act, 1894, exclusively applies to Scotland. Sub-sect. 14 provides that "settled property," which is property held in trust for certain persons by way of succession, shall not include property held under entail. Sub-sect. 15 provides that an institute or heir of entail in possession of an entailed estate shall, whether sui juris or not, be deemed for the purposes of the Act to be a person competent to dispose of such an estate. And sub-s. 16 enacts that "where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail without" consent, "settlement estate duty," as well as "estate duty," "shall be paid in respect of said estate," but neither duty is to be again payable in respect of such estate until such estate is disentailed, or until the death of a subsequent heir who can disentail without consent. The term "entailed estate" in Scotland has no significance except what it derives from the statutes that created the term. It is a legal term the creature of statute: *Hamilton* v. *Macdowal.* (2) It should, therefore, be read as comprehending whatever is entailed estate within the meaning of the Entail Acts. The Act of 1685, c. 26, prescribes the requisites of an effectual entail, declaring that it shall be lawful to tailzie lands and estates. The next important Act is the Rutherfurd Act, 1848 (11 & 12 Vict. c. 36).

(1) 3 F. 440. (2) (March 3, 1815) 18 Fac. Coll. 302, 326, 327.

One of its main provisions was to enable heirs in possession to disentail; and for the first time clauses were introduced which dealt with money as distinct from land—that is, money held in trust to be invested in land to be entailed: see ss. 26, 27, 28, 29. By the interpretation clause (s. 52) the words "entailed estate" are to extend to and comprehend all heritages which by the law of Scotland may be made the subject of entail. See also the Acts of 1853 (16 & 17 Vict. c. 94), ss. 8, 25, and of 1868 (31 & 32 Vict. c. 84), ss. 2, 8. The Act of 1875 (38 & 39 Vict c. 61) by s. 3 provided that "entailed estate" shall include (inter alia) "all money or other property real or personal invested in trust for the purpose of purchasing land to be entailed." Then s. 2 of the Act of 1882 (45 & 46 Vict. c. 53) provided that the expression "Entail Acts" shall mean the Acts mentioned in the schedule and this Act, and that they "shall for all purposes and to all effects be read as one Act." The Act of 1875 is, with others, included in the schedule. The result is to import the definition in the Act of 1875 into the Act of 1882. By the latter Act also the price of an entailed estate "shall be entailed estate" (s. 27): see *Black* v. *Auld* (1), *Dickson* v. *Dickson* (2), and *Paterson* v. *Paterson*. (3)

If you are construing a taxing statute, and that statute uses a legal term, that term must be taken in the legal sense unless a contrary intention appears. Therefore, the legal term "entailed estate" being used in the Finance Act of 1894, reference must be made to the Scottish statutes and cases thereon for a definition: *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4); *Blair* v. *Duncan*. (5) See also *Stephenson* v. *Higginson*. (6)

Asher, D. F., and *J. Campbell Lorimer* (with them *R. G. Seton*) (all except the last of the Scottish Bar), for the respondents. The respondents contend that, having regard to the nature of the balance of 60,000*l.* and the language of the statutes, it is clear that the 60,000*l.* is not "entailed estate." On Edward

(1) (1873) 1 R. 133.
(2) (1855) 17 D. 814.
(3) (1888) 15 R. 1060.
(4) [1891] A. C. 531, 580.
(5) [1902] A. C. 37.
(6) (1852) 3 H. L. C. 638, 686.

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William Sprot's death "estate duty" was paid on Drygrange, and was also paid erroneously upon the said trust fund. Sect. 1 of the Finance Act, 1894, points to a distinction between property "settled" and "not settled," and s. 21, sub-ss. 1, 4, give an exemption to personal "settled" property. The reason for the exemption probably is that personal property "settled" by one dying before 1894 must already have paid inventory duty. "Settled" is defined by s. 22, sub-ss. (*h*), (*i*). The definition exactly describes the 60,000*l.* trust fund; it is therefore "settled" property, and exempt.

The respondents submit that the trust fund is not entailed, or held under entail, but that it is vested in the respondents under a trust deed with a view to being entailed in the future. There is no definition of the words "entailed estate" in the revenue statute of 1894 as there is of "settled property," and thus the natural and common law meaning of the words applies. The only statute giving power to entail is the Act of 1685; all the others are merely for the purpose of enlarging the powers of heirs of entail. The object of the Act of 1848 was to relax somewhat the fetters of the Act of 1685. And power was given to the heirs of entail with respect to money on the way to being entailed. The clauses of that Act bring the money into the Entail Acts, but do not make it "entailed estate," but enable the heir to get the money without it ever passing through an entail. The object of the subsequent Acts was to enlarge the power of the heir into fee simple and get at trust moneys trusted to be entailed. The Act of 1875 does not enlarge the subject capable of being entailed. It does not make money entailed estate, but gives power to get at it as if it were entailed estate: see *Kinnear* v. *Kinnear*. (1)

Secondly, by the codicil this trust fund can be invested in land in England at the discretion of the trustees. How, then, can the appellant say this money is "entailed estate" in Scotland.

Scott Dickson, S.-G., in reply. Until the trustees have exercised their discretion the direction remains to purchase land in Scotland, and until the choice is made the fund remains

(1) (1877) 4 R. 705, 707.

"entailed estate": see *Buchanan* v. *Angus* (1) and *Attorney-General* v. *Marquis of Ailesbury*. (2)

The House took time for consideration.

EARL OF HALSBURY L.C. My Lords, I do not think it necessary in this case to say more than this—that the question is whether a sum of money resulting as a balance from certain investments in Scotland is or is not entailed estate within the meaning of the Scottish Finance Act. I suppose no one, apart from some interpretation clause, would say that it was entailed estate, nor do I think it important to consider that the Court of Chancery in this country, where money has been irrevocably devoted to the purchase of land, may apply to it the considerations which would apply to it if it were land itself.

The questions which have been argued in the Scottish Courts have been applied only to the first hypothesis I have suggested, and the division of opinion appears to have arisen on the question whether a technical phraseology applicable to Finance Acts is supposed to run through all the Finance Acts where they are enacted to be read together, or whether the technical phraseology is only to be so interpreted as to belong to the particular statute in which it is found.

My Lords, I hesitate to express any opinion on that question, because I think it is inaccurate to say that that question arises here. The sum which was devoted by a trust, in the first instance, in trust for purchasing land in Scotland to be entailed in accordance with the directions of the testator's will, was materially altered from the disposition originally made by a codicil to his will, the effect of which never seems to have been suggested as influencing the discussion to which I have referred in the Scottish Courts.

To my mind, that codicil has completely altered the question. The codicil permitted the money in trust to be invested at the discretion of the trustees in England, to which, of course, the interpretation clause of the Scottish Act does not attach. That discretion, and the consequence of it, appears to me to

(1) (1862) 4 Macq. 374, 379. (2) (1887) 12 App. Cas. 672.

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dispose of the argument; and I am prepared, therefore, to move that the appeal be dismissed, though, as I have said, without determining the question which appears to have been decided by the Scottish Courts without reference to the matter to which I have referred.

LORD MACNAGHTEN. My Lords, the question in this case is whether the unexpended balance of the estate of Mr. James Sprot, who died on July 5, 1882, is or is not "property held under entail" and "entailed estate" within the meaning of the Finance Act, 1894, as applied to Scotland.

Mr. James Sprot, by a trust disposition dated May 17, 1879, gave a large sum of money, afterwards reduced by a codicil to the sum of 100,000*l.*, in trust for the purpose of purchasing land in Scotland to be entailed in accordance with the directions of his will.

The Lord Ordinary held that the unexpended balance of this sum (now about 60,000*l.*) was "entailed estate." The First Division, on appeal, held that it was not.

Unfortunately the attention of neither Court was called to the provisions of the codicil of May 17, 1879, which authorizes the trustees (if in their discretion they should think it desirable), in place of purchasing land in Scotland, to purchase land in England to be entailed according to English law.

The effect of this codicil was that the money was no longer dedicated to the sole purpose of purchasing lands in Scotland to be entailed according to the law of that country; and therefore it seems to me impossible to hold that the money, or so much of it as for the time being remains uninvested in land, comes within the meaning of the expression "entailed estate" in the provisions of the Finance Act applicable to Scotland. Under the directions of the codicil the trust to purchase lands in Scotland ceased to be imperative. On this ground I think the decision of the First Division must be upheld.

Inasmuch, however, as the question on which the Courts in Scotland were divided was argued at length at the bar, it seems to me that it would not be right to pass it over in

silence. On this point I agree with the Lord Ordinary, for the reasons which will be stated presently by my noble and learned friend, Lord Robertson. It seems to me that when you have to construe a technical expression introduced into the legal vocabulary by a series of statutes forming one code, you naturally turn to the code for light and help. And the key to the true meaning of the expression will, I think, be found in the latest development of legislation rather than in its earliest effort.

I think the appeal must be dismissed with costs.

LORD SHAND. My Lords, I am also of opinion that the interlocutor should be affirmed, on the ground that, as the testator has provided that his money may be invested in England, to be entailed according to the law in England, it cannot be said that this makes the property "entailed estate" within the meaning of the Finance Act, 1894, as applicable in its provisions to Scotland.

But I must add that, apart from the provision of the codicil of 1879, I should arrive at the same result, for I agree with the views expressed by the First Division of the Court in reversing the judgment of the Lord Ordinary.

The question is one of difficulty, having regard to the provisions of the Entail Acts of 1875 and 1882, but I find nothing in these statutes which makes money directed to be invested in the purchase of land "entailed estate" in the ordinary acceptance and meaning of that term, or which can be held to enact that the words "entailed estate" shall, except for a defined and limited purpose, be held to include such money, which is otherwise personal estate. Such money is not entailed. It is money which, in the first place, must be converted into land, for money does not admit of being entailed. Again, even after land has been purchased, it does not become entailed estate till the land purchased has been entailed by a deed of strict entail, which has been duly registered as such in the appropriate register of entails.

In this case lands were not even acquired, much less entailed, by the necessary deed duly registered. The direction to convert

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the money into land and to entail the land did not and, as I think, could not, entail the money, which remained purely personal estate, though directed to be used in a particular way.

What, then, is the effect of the provisions of the entail statutes? Not, I think, to convert personalty into realty, and to entail that realty by enactment, but merely that *for the purposes of these statutes* in disentailing and otherwise providing that the property of entailed proprietors may, with the requisite consent of expectant heirs, be made free from the restrictions of entails, money which has been directed to be converted and employed in the purchase of lands to be entailed shall be treated as if these directions had been carried out and lands had been bought and entailed. In short, that the entire estate, land entailed and money, shall be treated in the same way and under the same conditions as one estate. I agree in the judgment of the First Division that the statutes enact only that in these statutes, and only for the purpose of these statutes, in their provisions (which are really intended and calculated to break down entails, and not to enforce or enlarge their provisions) money which is there called "entailed money" shall be regarded as "entailed estate." The words of the statute of 1882 are that "*In this Act* the following words shall have the meanings hereby assigned to them." The enactment, to that limited effect, is made very properly to apply to the proceeds of entailed land which has been sold and money ordered to be invested in land to be entailed, which money is made subject to the same provisions for obtaining freedom from the fetters of the entail as the entailed lands themselves. There is no such general provision, and one could scarcely conceive of such a provision, as that in all circumstances, e.g., in contracts and in all future statutes, the words "entailed estate" shall include in its meaning money directed to be converted into land to be thereafter entailed. The Entail Act of 1872 does not seem to me to be in any way different in the effect of its provisions from the Act of 1882.

On the whole, then, I am of opinion that the words "entailed estate" in the Finance Act of 1894 must be taken in their

ordinary and proper signification as referring to estate which has been entailed, and not to money intended and directed to be used in the future purchase of lands to be entailed; and that the later entail statutes give a wider meaning to these words only where used in these statutes, and only for the special purpose of making such money liable to be dealt with, as the lands really entailed may be dealt with, under the general provisions of these statutes.

LORD BRAMPTON. My Lords, I also am of opinion that this appeal should be dismissed. I should be content, if necessary, to rest my judgment upon the facts that by the combined effect of Mr. Sprot's will and codicil his trustees were empowered and directed to apply the sum of 100,000*l.* in the purchase of lands, either in Scotland or in England, at their discretion, to be strictly entailed according to the law of Scotland or of England, in which the lands might be situate; that although they had applied a portion of that money to the purchase of an estate in Scotland, as to which no question arose, the remainder, 60,000*l.*, is still uninvested, and is not, and possibly never may be, chargeable with the settlement estate duty claimed by the Lord Advocate.

I have read with great attention the clear and convincing judgment about to be delivered by my noble and learned friend, Lord Robertson. I concur so entirely in his conclusions and his reasons, that I can add nothing with satisfaction to myself.

LORD ROBERTSON. My Lords, the proposition maintained by the appellant, affirmed by the Lord Ordinary, and negatived by the First Division, is that money held in trust and directed to be laid out in land to be strictly entailed is entailed estate in the sense of the Finance Act, 1894. Subject to one limitation, that proposition seems to me to be sound; but the limitation, in my opinion, excludes from the proposition the money now in dispute. In order to be entailed estate in the sense of the Finance Act, the money must be directed to be laid out in land to be strictly entailed according to the Scottish law of entail,

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and therefore in Scotland. This, as it seems to me, is not merely the necessary condition of the doctrine maintained by the appellant, but is its foundation, and without it the doctrine seems to me to have no support at all. Yet this condition renders the doctrine inapplicable to the appellant's case. His whole argument (which I think sound) is founded on Scottish statutes which form part of the land laws of Scotland, and have no application to land or to entails outside Scotland. But it turns out that, in a due exercise of the discretion of the trustees who hold this money, it need never go into Scottish land at all. In order to shew the limitation of the doctrine in question, it is necessary to examine its origin and ascertain its merits.

No one has denied that the only power to execute an entail, using that word in the only operative sense of the term, must be found in the Act of 1685, or has asserted that under that statute you can entail money. I fully allow that this is a good beginning to the argument against the appellant; and the statute of 1685 is regarded by the First Division as the proper criterion of the meaning of the words in question. Again, it is quite true, as far as it goes, that all the entail statutes subsequent to 1685 have gone towards breaking down rather than towards constructing entails. But when from this fact the inference is drawn that those statutes are unlikely to contain the means of determining the scope of the term "entailed estate," my assent is less readily given. We are in search of the sense in which those words are used in a statute in 1894; the vocabulary of that day is to be looked to, and if, as is the case, the words "entailed estate" and their equivalents are now in fact more in use in relation to relaxing than to constructing entails, that does not invalidate the criterion to which appeal is made. The purpose for which men speak of a thing is immaterial if they have occasion to speak of it. Now, the case of the appellant is that in 1894 the word "entailed" had come to be applied to moneys which stood in certain relations to entailed land, either as being its proceeds and standing under the same trusts, or as destined and held in trust for the purchase of land to be entailed. I think this is true in point of fact, and

I must say that I think the Act of 1882, let alone the Act of 1875, demonstrates this. The 27th section declares that the price of an entailed estate shall be entailed estate within the meaning of the Entail Acts; the 28th assumes (which is even more than asserting) that an entailed estate may consist of money; and that this assumption is not rested on the 27th section is manifest, for the 28th is applying the provisions of the 27th to other entailed estates than those which fall under its terms. Not less significant is the use, without any explanation or apology, of the words "entailed money," in both the 4th and the 5th sub-sections of s. 23.

The Act of 1882 has this double significance in the present question: it was in 1894 the latest expression of the Legislature on Scottish entail (and there is none since 1894); and it gathers up and brings together all the preceding statutes. But when we go seven years back, to the Act of 1875, we find that the term "entailed estate" had been already expressly extended to include all money held in trust for the purposes of being entailed. Now I am willing to assume, as is quite justly pointed out, that this is (and it could hardly be otherwise) for the purposes of that Act, (observing only that the same criticism can hardly be applied to the Act of 1882 in view of its 2nd section). But the Act of 1875 covers a large area of the law of entail, and accordingly the use in their wider sense of the words "entailed estate" became from 1875 onwards correspondingly frequent, and made the additional sanction and stimulus given to that use in 1882 all the more decisive.

If, as the learned counsel for the appellant invited us to do, we observe the progress of legal thought antecedent to 1875 as illustrated in judicial decisions, we see evidence that the working of the earlier of the modern Entail Acts, particularly that of 1848, had fully prepared men dealing with those matters to call moneys so situated (as they were in fact being treated) entailed estate. Accordingly the legislative appellation or description in the Acts of 1875 and 1882 of such moneys as entailed estate is not a case of the Legislature calling one thing by the name

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of another, but is a recognition of the fact that for practical purposes those moneys had come to possess the attributes of entailed lands, so far as any such now remained. (This topic might be more fully developed, but the matter does not admit of dispute.)

What I deduce from these considerations is that if the existing state of the law, especially as exhibited in its most unmistakable form, legislation, be the proper criterion of the meaning of words descriptive of legal rights, entailed estate did in 1894 include moneys directed to be applied in purchase of lands to be entailed. The principle that in statutes words are to be taken in their legal sense has, as Lord Stormonth-Darling points out, a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them. I say this, because I observe that in the judgment delivered by Lord M'Laren some reliance is placed on the "ordinary use of language." Now it seems to me that this would prove too much in the present case. If the phrase in question represents anything definite in popular use, I suspect the meaning is determined quite as much by a misuse of the word "estate" as equivalent to landed property as by any intelligent use of the term "entailed," and that popular use would reject the words if applied to anything else than a landed property. Yet it is perfectly certain that other estate than landed property may be the subject of entail, as, for instance, a right to salmon fishing.

In what I have hitherto said it has been assumed that the words to be construed in the Finance Act are entailed estate, and that the Act itself gives no further aid in the construction of that term. This, however, is to understate the appellant's case. The words directly descriptive of "settled property" (which is the appellation under which the respondents seek to claim exemption) are those in the 14th sub-section of s. 23: "The expression 'settled property' shall not include property held under entail"; and then in sub-s. 15 occurs the phrase

"entailed estate," manifestly used as equivalent to what is in sub-s. 14,—the indefinite article "an" entailed estate being inserted because the form of illustration postulates an individual estate in relation to an individual proprietor.

The matter, however, may be brought to a much sharper point. In the face of the express and direct enactments in the Acts of 1875 and 1882 which I have cited, I am at a loss to see how it can be affirmed of money directed to be applied in purchase of land to be entailed that it is not entailed estate—at least in some sense and to some effect. And if this be so, then quomodo constat that it is not in the sense of this Finance Act?

I have not myself realized in what sense it is not entailed estate, except that some of the many provisions about entails do not apply to it. But this again proves a good deal too much. Some of the empowering Entail Acts assert that it would be for the public benefit if villages were built on entailed estates. Now exactly the same reasoning as the respondent advanced would deduce from this that salmon fishings do not fall within the scope of the Entail Acts, because you cannot build villages on salmon fishings or the right to salmon fishings.

But when we are told that, at all events, a Finance Act cannot be supposed to view as entailed estate moneys situated as those which I have been considering, I completely fail to see the reason. Even if a more rationalistic method be applied than is permissible in taxing Acts, I should have thought that, in a definition (s. 23, sub-s. 14) the object of which is to distinguish something from settled property, the subject-matter of the rights, as land or money, was very much less relevant than the quality and correlation of the rights in that subject-matter; and so far as these are concerned, it is just because they are practically identical in the one case and in the other, that land and money are now massed under the common denomination "entailed estate."

From the somewhat detailed examination now made of the question argued in the Court of Session, it is at least apparent that the argument of the appellant begins and ends in the

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Scottish entail statutes. The 3rd section of the Act of 1875, which puts at its sharpest the appellant's contention, requires that money, in order to be entailed estate, must be "invested in trust for the purpose of purchasing land to be entailed." The whole theory of the identification of such money with land is that it is directed and destined to be put into land, and its inevitable fate is merely anticipated. But if, instead of it being so inevitably destined, the trustees may or may not so apply it, the whole ratio of those enactments is gone. Now it seems to me that the combined effect of Mr. Sprot's will and his first codicil was simply to make it discretionary and optional to the trustees whether they bought Scottish land or bought English land, and the mere circumstance that the will "directed" Scottish land to be bought has no effect at all in saving that direction from being reduced to an option by the codicil.

The appellants vainly endeavoured to save the situation by relying on the direction to "entail" whether the land was in Scotland or in England. But an English entail is one thing and a Scottish entail is another. And the whole argument of the appellant on the main question rests, not on the word entail, but on the statutes which have no application to England.

On this sole ground I am of opinion that the appeal must fail.

LORD LINDLEY. My Lords, s. 23 of the Finance Act, 1894, relates to the application of the Act to Scotland, and clause 14 declares that "the expression 'settled property' shall not include property held under entail." Whatever difficulty there may be in determining whether these words include money directed to be laid out in land in Scotland and to be entailed according to the laws of that country, the expression "property held under entail" in a section relating solely to Scotland cannot, in my opinion, apply to land in some other country, nor to money to be laid out in the purchase of land in some other country, even although such land is to be held upon trusts creating interests similar to those created by a Scottish entail.

Now, the trust disposition or will in this case undoubtedly created a trust to lay out money in the purchase of land in Scotland to be held under entail according to Scottish law, but the direction contained in this will was very materially altered by the codicil. The two instruments together impose upon the trustees an obligation to lay out money in land; but that land need not be in Scotland; it may be in England. The trustees are to exercise their own judgment, not only as to when they will invest the money in land, but as to the country in which the land to be bought shall be situate. Even if, therefore, the money can be regarded as converted into land, it is, in my opinion, impossible to treat it as converted into land in Scotland before it is actually invested or agreed to be invested in such land. In other words, the money whilst uninvested cannot be regarded as "property held under entail" within the meaning of s. 23, sub-s. 14, of the Finance Act; nor can the money be regarded as "an entailed estate" within the meaning of sub-s. 16 of the same section.

It is so well settled that there is no conversion of land into money or of money into land, if the trust for conversion is not imperative, that it is quite unnecessary to cite authorities on the point. They will be found collected in Lewin on Trusts, 10th ed. pp. 1158 and 1163. I do not understand that there is any difference between the law of Scotland and the law of England on this subject; and consistently with this principle the money in question in this case cannot be regarded as land in Scotland.

In this view of the case, it becomes unnecessary to determine the more difficult question whether, if the original trust dispositions had not been varied by the codicil, the money thereby directed to be invested in land in Scotland and to be entailed would or would not have been "property held under entail" within the meaning of s. 23, sub-s. 14, of the Finance Act, 1894. I have, however, carefully considered this question, and I concur in the conclusion arrived at and expressed by my noble and learned friend Lord Robertson in his judgment, which has removed the doubts I at one time entertained on this part of the case.

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I am of opinion that the appeal fails, and ought to be dismissed with costs.

Ordered that the appeal be dismissed with costs.

Lords' Journals, May 15, 1902.

Agents for appellant: *Solicitors of Inland Revenue for Scotland and England.*

Agents for respondents: *Martin & Leslie, for Blair & Cadell, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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PARISH COUNCIL OF RUTHERGLEN APPELLANTS;

AND

PARISH COUNCIL OF GLASGOW . . RESPONDENTS.

Poor Law—Settlement—Capacity of deserted Wife to acquire a Settlement—Poor Law Settlement (Scotland) Act, 1898 (61 & 62 *Vict. c.* 21), *s.* 1.

By s. 1 of the Poor Law Settlement Act, 1898, "No person shall be held to have acquired a settlement in any parish in Scotland by residence therein, unless such person shall . . . . have resided for three years continuously in such parish and shall have maintained himself . . . . and without having received or applied for parochial relief. . . .":—

Held, that a married woman having a husband living from whom she has derived a settlement cannot, although deserted by him, acquire a settlement different from that of her husband.

Gray v. *Fowlie*, (1847) 9 D. 811, affirmed.

APPEAL from a decision of a Court of seven judges (dissenting, Lord Young) of the Court of Session, Scotland. (1) The question in this appeal was whether Catherine Faulds, the deserted wife of Alexander Faulds, had acquired by residence a settlement for poor law purposes in the appellants' parish of Rutherglen. The respondents, the parish council of Glasgow, maintained that she had; the appellants, the parish council of Rutherglen (the pursuers), contended that she had not, and

(1) (1901) 3 F. 705.

that her legal settlement was in the respondents' parish, her husband's last known settlement. The following statement of facts is taken from the opinion of Lord Brampton :—

"In March, 1899, Catherine, the wife of Alexander Faulds, became chargeable to the parish of Rutherglen, from which she received weekly relief to the amount of 4*l.* 10*s.* This sum Rutherglen seeks to recover from the parish of Glasgow, upon the ground that Glasgow was the place of her last legal settlement.

Both husband and wife were born in Glasgow, and each had a birth settlement there, but on their marriage the wife's settlement, by very familiar law, merged in that of her husband. Several children were the issue of that marriage. They, of course, took on their birth the settlement of their father, who, for anything we know, still retains his birth settlement.

The whole family resided together in Glasgow until October 16, 1893. On that day the husband deserted his wife and children, leaving them chargeable to the parish of Glasgow. They were received into the poor-house of that parish, where they remained until January 31, 1894, when the wife voluntarily left the house, taking with her her eldest daughter aged ten years, but leaving behind her the four younger children still chargeable. On October 26 the husband, for his desertion of his wife and family, was committed to prison for sixty days, which expired on December 24. After his release he does not appear to have visited his wife or his children ; but, being still liable to maintain them, he negotiated with the inspector of the poor of Glasgow, and on January 17, 1894, agreed to pay him 5*s.* weekly towards their support, the inspector undertaking to relieve him from further responsibility. Since that day the four children have been maintained by the parish of Glasgow, though boarded out of the poor-house. Their father, with no great regularity, made weekly payments under the agreement until May 12, 1896 ; since which day he has made no contribution for their maintenance. His occupation was that of a miner and his earnings were somewhat uncertain. I collect from the case that he worked and lived in the neighbourhood,

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though his precise address seems to have been doubtful. He was last heard of at Paisley on August 25, 1896. But in a parish book for the year 1898 I find an entry touching the children to this effect: 'Father living in cohabitation with another woman; mother unfit to support.' Nothing more is disclosed as to the husband.

As to the wife, the mother of the children, it appears that shortly after leaving the poor-house she made her way with the eldest daughter to the parish of Rutherglen, where she obtained work and continued to reside, supporting herself by her own industry until March 13, 1899, when she became chargeable to and was relieved by that parish.

In this action Rutherglen seeks to recover from Glasgow, as the place of her legal settlement, the amount of the relief they have given her. Glasgow repudiates the claim on the ground that since coming to reside in Rutherglen she had lost her husband's settlement by gaining an independent settlement for herself in that parish by continuous residence therein without parochial relief for a period of more than three years under s. 1 of the Poor Law Settlement (Scotland) Act, 1898. The learned judges by whom this case was heard decided by a majority that the contention of the parish of Glasgow was right, and this appeal is against that decision."

April 25, 28, 29. *A. Graham Murray, L.A.*, with him *A. Orr Deas* and *Craig Henderson* (the first and second of the Scottish Bar), for the appellants. The judgment of the majority of the judges is erroneous. The principle of the law in England and Scotland as to derivative settlement is the same: *Adamson* v. *Barbour*. (1) In the case of *Gray* v. *Fowlie* (2) nine judges out of thirteen held "that though a husband desert his wife and go abroad she cannot, until the dissolution of the marriage, acquire a settlement in any parish different from that in which his settlement was at the time he left the country." The respondents contend that this case is no longer the law, and they rely on *Hay* v. *Skene* (3);

(1) (1853) 1 Macq. 376. (2) 9 D. 811.
(3) (1850) 12 D. 1019.

Gibson v. *Murray* (1); *Carmichael* v. *Adamson* (2); *Masons* v. *Greig* (3); *Greig* v. *Simpson* (4); but the appellants submit these cases do not repeal *Gray* v. *Fowlie*. (5) *Beattie* v. *Greig* (6) is only the cases of Hay and Murray over again.

[THE EARL OF HALSBURY L.C. mentioned *Rex* v. *Harberton* (7), where the Court sent the case back for evidence of the husband's settlement.]

Beattie and Muir v. *Brown* (8) and *Wallace* v. *Turnbull* (9) give very curious illustrations.

Thomas Shaw, K.C., and *James Avon Clyde, K.C.*, with them *R. B. Pearson* (all of the Scottish Bar), for the respondents. The sheriff's decision in this case (10) found as a fact that the husband had deserted his wife. That finding is conclusive of the fact. The respondents submit that a deserted wife has power to obtain for herself a settlement from industrial employment. In the present case the wife, by residence during three years in Rutherglen without parochial relief, acquired a settlement in her own right. There is no doubt that there is some inconsistency in the dicta in the different cases, but for forty years *Gray* v. *Fowlie* (5) has been held not applicable to the case of a deserted wife obtaining a settlement: see Lord Fullerton and Lord Moncreiff in *Gray* v. *Fowlie* (5) for the sound principle followed in the later cases. The majority of the Court in *Gray* v. *Fowlie* (5) went too far. The subsequent cases established the rule that desertion operates like death, and that a deserted wife is capable of acquiring a residential settlement for herself: *Carmichael* v. *Adamson* (2); *Masons* v. *Greig* (11); *Greig* v. *Simpson* (12); *Johnston* v. *Wallace* (13); *Beattie and Muir* v. *Brown*. (8) Be it good or bad, the rule that a husband's desertion is equal to his death has been followed for a great many years, and it would be a great misfortune if it were abrogated.

(1) (1854) 16 D. 926.
(2) (1863) 1 M. 452.
(3) (1865) 3 M. 707, 716.
(4) (1876) 3 R. 642.
(5) 9 D. 811.
(6) (1875) 2 R. 923.
(7) (1811) 13 East, 311.
(8) (1883) 11 R. 250.
(9) (1872) 10 M. 675.
(10) Nov. 13, 1899.
(11) 3 M. 707, 716, 718, 719.
(12) 3 R. 642, 644, 645.
(13) (1873) 11 M. 699.

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A. Graham Murray, L.A., in reply. The old Scottish law of settlement rests on the statutes 1579, c. 74; 1695, c. 43; 1698, c. 21: Ersk. Inst. 1, 7, 63; *Parish of Crailing* v. *Parish of Roxburgh*. (1)

The House took time for consideration.

May 15. EARL OF HALSBURY L.C. My Lords, the one question which appears to me to be cardinal in the determination of this appeal is whether it is true to say that when a husband deserts his wife she can until the dissolution of the marriage acquire a settlement different from that which was her husband's at the time he deserted her. I am of opinion that she cannot.

The line of authorities quoted by the respondents are for the most part irrelevant to this question, inasmuch as with one exception they were cases in which the husband had no settlement at all—either no settlement, or no settlement in proof before the Court.

That a wife upon her marriage acquires her husband's settlement cannot be disputed, and while the marriage continues that settlement must remain. It is obvious, therefore, that if I am right in treating the authorities quoted to your Lordships as being applicable to cases where the husband either had none or was assumed to have had none, the question as I have propounded it did not arise.

Underlying both the reasoning and the determination of the judgment appealed against is the proposition boldly laid down by Lord Kinnear that the desertion of a wife by a husband is the death of the husband, or, as his Lordship says, putting it in another form, there is no dispute as to the general law that where a husband deserts his wife and family, desertion in a question as to parochial relief is equivalent to death. I cannot help thinking that the use of that phrase in poor law statutes has led to great misapprehension.

It is true enough the statute enacts that a destitute deserted wife may be relieved under the poor law as though she were a

(1) (1767) Mor. Dict. 10573.

widow, but no Act has provided that she may acquire a settlement in her own right if she is deserted. And the statute does not make her a widow for all purposes, but simply provides that she may receive parochial relief as if she were a widow.

The singular result in this case would be that the deserted woman is a widow with a husband alive; she has neither applied for nor obtained parochial relief, and she is made a pauper by the maintenance of the children of the marriage under an arrangement made by her deserting husband with the poor law authorities.

The only doubt I have entertained has been in respect of the peculiarity of the law of Scotland as to the position of a deserted wife having authority to enter into contracts for herself; but I am satisfied by the decision of the majority of the Scottish judges in *Gray* v. *Fowlie* (1) that that authority does not extend to the proposition that she can create for herself a settlement which shall have the effect of extinguishing the settlement of her husband, relieving him, therefore, of the obligation to support the children of the marriage, and depriving her of rights which the law has invested her with, and which would be destroyed by the wrongful act of her husband.

My Lords, to my mind this is sufficient to dispose of the principle upon which the decision rests, and I am of opinion that the decision should be reversed, with the ordinary consequences.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I have had an opportunity of reading and considering the judgment about to be delivered by my noble and learned friend, Lord Robertson, and I agree in it entirely.

LORD SHAND. My Lords, my noble and learned friend Lord Robertson has given me an opportunity to read and consider the full and, if I may venture to say so, the interesting and very clear judgment he has prepared in this case, in which all the authorities in the law in Scotland touching the

(1) 9 D. 811.

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question of the position of a married woman deserted by her husband who has a subsisting settlement in Scotland have been cited and discussed. I entirely concur, not only in the result of his Lordship's judgment, but also in holding that the view that desertion is to be taken as equivalent to death, and that the position of a deserted wife is in its legal aspect the same as that of a widow, is not consistent with the authority of the case of *Gray* v. *Fowlie* (1) and the other authorities which so strongly settle the principle that in Scotland a wife's settlement must be that of her husband. It would be an idle waste of time on my part to examine again the cases which his Lordship has so fully gone into, and I have only to add that I agree with his Lordship's opinions on these cases in the valuable historical view of them which he has presented.

Taking the question raised as one to be determined on Scottish law only, I am therefore of opinion that desertion by a husband of his wife is not equivalent to his death, and that the appeal should be allowed and the defence sustained with costs.

LORD DAVEY. My Lords, I concur in the judgment which has been proposed by my noble and learned friend on the Woolsack, and I can state my reasons for doing so very shortly. I find that the exact point which has been argued in this appeal was decided by the whole Court of Session so long ago as the year 1847 in the case of *Gray* v. *Fowlie* (1), and I cannot find that any decision at variance with that case has ever been given in the Scottish Courts. I find also in the case of *Adamson* v. *Barbour* (2) in this House a strong expression of opinion that the principle of derivative settlement ought to be maintained with all its consequences. It is true that that case is not a direct authority in the one before your Lordships, because it was a question relating to minor children only, and the contest was between the father's place of settlement when he left the country and the place of the children's birth. But the grounds assigned by Lord Cranworth for his opinion appear to me, as they did to Lord Young, to support the view

(1) 9 D. 811. (2) 1 Macq. 376.

which I have taken of the present case. Against the decision in *Gray* v. *Fowlie* (1) there have been quoted to us a certain number of dicta by learned judges, and a principle is said to have been laid down which is in conflict with the principle of the decision in *Fowlie's Case*. (1) I will not trouble your Lordships by a detailed examination of those cases which were very fully discussed at the bar and will, I believe, be examined and commented on by my noble and learned friend Lord Robertson. They are said to have established as a proposition of Scottish law that in its effect on the status of a married woman desertion by her husband is equivalent to his death. Now, my Lords, that may have been an appropriate and accurate way of stating the effect of the law in the cases then before the Court, but it is not a legal proposition or even an accurate statement of the law generally. The adoption of it as a formula to solve all questions as to a deserted wife's settlement is only another illustration of the danger of elevating an epigram into a principle of law. I am, therefore, of opinion that the motion proposed is in accordance with the weight of authority in Scottish law, and, as it also commends itself to my judgment, I have no hesitation in expressing my concurrence. I will only add my satisfaction in knowing that my conclusion is in accordance with that arrived at by so experienced and learned a judge as Lord Young. I entirely accept the reasons given by him.

LORD BRAMPTON. [His Lordship having stated the facts as quoted above, continued:—] The first matter to be considered is whether the wife had during her husband's life capacity to acquire any independent settlement other than that she derived from him. The ground upon which it was broadly contended that she had such capacity was, that there was a well-settled principle applicable to the poor law of Scotland that a deserted wife during desertion is in the same position as a widow—that is, sui juris; and, therefore, may during desertion acquire a residential settlement for herself.

I cannot agree that any such principle exists to the extent

(1) 9 D. 811.

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claimed. To some extent I grant that a woman deserted by her husband may during his desertion of necessity be treated and dealt with as a widow. But it is, in my opinion, against every principle of the law affecting parish relief both in England and in Scotland to recognise the ability of a married woman having a living husband, from whom she has derived a settlement in the county in which she is residing—and which settlement he still retains—to abandon that settlement and gain a new and independent settlement in her own right—and for herself only—for certainly neither husband or children could share it with her. Not a single judgment can be cited in which prior to the present case such a settlement has been directly held to be valid, either in England or in Scotland. No statute can be found to sanction it; and we have been referred to no work of authority which declares the recognition of the few dicta and, as I think, erroneous opinions which have been called to our attention. I purposely abstain from commenting upon those cases cited from the Courts in Scotland, because, having just read the judgment of my noble friend Lord Robertson, I find he has so thoroughly done so that further comment would be supererogatory. I will content myself by simply stating that the origin and reason of the law which decrees that when a woman who before marriage has acquired a legal settlement marries a man who has also acquired a legal settlement, she by such marriage merges her own settlement in that of her husband, is to avoid the separation of husband and wife, which the law does not permit, and the origin and reason for decreeing that the issue of that marriage shall take the settlement of the parents is, that they may be under the care and protection of their parents until they become emancipated and get a new settlement for themselves; and to prevent their separation from their parents in the meantime. These objects would be utterly defeated if, in such a case as the present, the husband having deserted his wife and children, the wife could "as a widow" acquire a new settlement for herself, which she could not extend to her supposed dead, though really living, husband—nor to her children who had acquired the settlement of their living father; for it is not suggested that they are to be

treated as fatherless, and that the settlement they acquired from him died with him while in fact the husband and father was alive and possibly gaining a new settlement for himself. To my mind the possibility of such a state of things gives to the contention of the respondents something approaching an appearance of absurdity.

Such being my opinion, it is unnecessary to consider whether, even had the law permitted, the wife would have acquired any settlement in Rutherglen, as to which I have grave doubts. I agree in thinking that this appeal ought to be allowed with costs.

LORD ROBERTSON. My Lords, for the clearer discussion of the important general question raised by this appeal, I intend to assume without reservation that Alexander Faulds had deserted his wife from and after October 16, 1893. By the time she became chargeable she had resided for the statutory period (without begging or receiving relief) in the appellant's parish; and if it be legally possible for the wife of a living Scotsman, who himself has a parochial settlement in Scotland, to acquire an industrial settlement for herself in a different parish from his, and so to relieve her husband's parish, then the appellants are liable. But the starting-point of the case is that the respondents are the parish of the husband's settlement; and what they have got to make out is that they are freed of their liability for his wife by the fact that he deserted her; for, but for the fact of his desertion, it is not, in the meantime at least, maintained that her separate residence in Rutherglen would of itself avail. Why this distinction should be drawn, and what is the special virtue of desertion in releasing the husband's parish of his liability to maintain his wife are, however, questions which it is difficult to evade, and which will recur in what I have to say.

The question before your Lordships' House is simplified by the clearness with which it is stated in the opinions of the learned judges. What their Lordships have held is, to quote the words of Lord Kinnear, that "it is settled now in law that the desertion by a husband of his wife is the death of the

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husband, and that the desertion by the husband puts the wife in the position of earning a residential settlement for herself, because it enables her or compels her to earn her own living, and to earn her own living as if she were an unmarried woman or a widow." Now there is certainly some show of authority for this proposition, although of itself it sounds rather startling, and although the boldness of its expression invites criticism. But while the majority of the seven judges, whose decision is under review, may have been right in thinking themselves bound by the more recent instead of the earlier statements of the law on this subject, I am almost sorry that so strong a Court as was constituted to consider this question did not critically examine the grounds upon which the formula rests, for they might ultimately have deemed themselves free to act on their independent judgment. The very careful argument to which your Lordships have listened has compelled such an examination by this House; and, so far as I am concerned, I am unable to support the judgment appealed against.

First of all, the proposition that the desertion of a husband is equivalent to his death is no doubt suggested by the judicial position of a widow under the Scottish poor law. A widow, it had been held in the *Crieff Case* (1), can acquire a residential settlement for herself, and for children living with her, in a parish where she has resided industriously as the head of the family. This seems a very sound proposition, and for present purposes I have nothing to say against it. The woman in that case has no husband; she is under no disability, and there is nothing and nobody to prevent her acquiring a settlement for herself. But when it is proposed to assimilate to a woman having no husband a woman who has one, a question of the gravest principle arises.

Now this question did arise in Scotland, five years after the *Crieff Case* (1), in *Gray* v. *Fowlie* (2), in circumstances which, for practical purposes, are exactly the same as the present (the husband being a living but deserting Scotsman with a Scottish settlement), and it was decided by the whole Court, by nine to four, that a deserted wife was not in the same position as a

(1) (1842) 4 D. 1538. (2) 9 D. 811.

widow, but presented a case distinguished by the most vital difference. The case was deliberately considered. All and more than all the arguments which have been submitted to your Lordships' House on the present occasion on behalf of the respondents are to be found in the judgments of the minority of the Court. It was then said that the law recognised in a deserted wife capacities to act independently, in contracts and in suits, which made it reasonable that she should be held to acquire by her independent and industrious residence an independent settlement; and this view was supported by full illustrations of the common law. The reply of the Lord Justice Clerk Hope shews that this view of the question, at its best, was fully realized and fully met. His Lordship pointed out, in a passage of great merit, that the Scottish law in the chapter referred to did no more than come to the aid of a deserted wife by relaxing her disabilities so far as is necessary for the business of life in her isolated position; that the law in making such exception did not proceed on any view that the marriage was dissolved, or the woman's status altered, or that third parties can plead liberation of obligations towards her because of the husband's illegal conduct in deserting her. The right to separately contract and separately sue, where this conduced to or facilitated her gaining her living while left alone, did not, in the view of the Lord Justice Clerk, and of the majority in *Gray* v. *Fowlie* (1), involve any change of liability on the part of third parties to support her as the wife of the deserter.

Now if this case of *Gray* v. *Fowlie* (1) stood alone, it is admittedly directly in point; it is a decision of the whole Court, and it meets directly the argument on the common law rights of a deserted wife, which, at your Lordships' bar, has been indicated rather than developed.

No one can pretend that *Gray* v. *Fowlie* (1) is not in diametrical opposition to the doctrine that desertion is the same as death; and what is said is that *Gray* v. *Fowlie* (1) is no longer law. Now I think it is true that, in later decisions, the Divisions of the Court of Session have disregarded the decision

(1) 9 D. 811.

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of the whole Court, and have pronounced judgments inconsistent with it, but it has never been formally overruled. What is more, from *Gray* v. *Fowlie* (1) down to the present time, there has been no revival of the theory that the common law capacities of a deserted wife led to, or opened the door for, her acquisition of a residental settlement in the parish where she had exercised those capacities. As will immediately appear, the cases which set up the doctrine that desertion is death were not cases of a residential settlement at all, but of a maiden settlement. The theory that desertion is death may be good or bad, but it does not pretend to rest on the common law about deserted wives being able to contract and to sue.

How the newer and conflicting doctrine came into vogue was thus: A series of cases occurred in which, instead of the husband having, as in *Gray* v. *Fowlie* (1), a Scottish settlement, he had (or was supposed to have) no settlement available for attack by the relieving parish. This was the case in *Hay* v. *Skene* (2) in *Gibson* v. *Murray* (3), and in *Carmichael* v. *Adamson*. (4) What was said in those cases was that you must find a settlement somewhere, and that as the husband had none you must turn to the wife's own settlement (which in all these three cases was her maiden settlement and not a residential settlement). Now in passing it may be observed that in more recent times there would probably not be held to be any compelling necessity to discover for the relieving parish some other parish liable to it; and also that where the husband was an Englishman it did not follow that the relieving parish had no remedy under the 77th section of the Act of 1845 merely because that remedy was troublesome. But I will assume, as the Court did, that the husband had no settlement; and this is, past all doubt, the ground of decision in the first and most referred to of these three cases: *Hay* v. *Skene*. (2) The theory of *Hay* v. *Skene* (2) was that a wife does not lose her maiden settlement unless she gets one from her husband in exchange. This is most distinctly laid down by every one of the three judges who were parties to the decision, and, indeed,

(1) 9 D. 811.
(2) 12 D. 1019.
(3) 16 D. 926.
(4) 1 M. 452.

is repeated to elaboration in the leading opinion. This, moreover, is stated as the justification for distinguishing the case from *Gray* v. *Fowlie* (1) : "here the wife has a direct interest in the question raised"—that is to say, in *Gray* v. *Fowlie* (1) she got, and here she did not get, a new settlement. Now it is observable that, in the later development of the doctrine, this case of *Hay* v. *Skene* (2) was appealed to as settling that desertion was the same as death. In the reported judgments there is no direct expression of such a theory. The view taken was that the woman had her own settlement all along, until she or her husband got another, whereas in *Gray* v. *Fowlie* (1) she exchanged her own for her husband's. From the decision in *Hay* v. *Skene* (2) Lord Moncreiff dissented, on the ground that the proposed judgment was in conflict with the decision of the whole Court in *Gray* v. *Fowlie* (1), and Lord Moncreiff (who had been in the minority in the decision of *Gray* v. *Fowlie* (1)) says: "the principle is that a wife cannot be separated from her husband, except by death, divorce, or other legal process, and must be considered as still part of himself, for whom no claim can be made except through him and against parties liable on his account. But the plea of the pursuer assumes a persona standi in the wife apart from her husband, to the effect of creating rights to one third party against another without any provision to that effect in any statute."

Gibson v. *Murray* (3), the second of the cases I have named, is distinguished from the present by two vital differences: first, it is the case of a husband having or assumed to have no settlement; and, second, it is not a case of desertion at all, but of death, the dispute being whether, the husband dead, the children took their own birth settlement or their mother's maiden settlement. Its bearing is, therefore, too remote to justify further comment.

Carmichael v. *Adamson* (4) has much more importance, for several reasons. Here we have, launched for the first time, this maxim, that desertion is equivalent to death—received as

(1) 9 D. 811.
(2) 12 D. 1019.
(3) 16 D. 926.
(4) 1 M. 452.

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it was by Lord Justice Clerk Inglis with the remark that he could "find for it no reasonable or intelligible ground." The question in the case was whether an Englishman, assumed to have no settlement, having deserted his wife, the settlement of his child was that of its own birth or its mother's birth, and the whole Court held that it was the latter. The minority was headed by Lord Justice Clerk Inglis, and included Lord President Colonsay.

I have grouped these three cases together because they are all cases where the husband had no Scottish settlement. We come next to a case—*Masons* v. *Greig* (1)—where it was held to be doubtful in fact whether he had or had not a Scottish settlement, and the decision is to that extent unsatisfactory. It was a First Division case in the time of Lord Colonsay. The respondents can fairly claim at least two of the judges as acquiescing in the desertion—equal—death theory, and it is ascribed by Lord Ardmillan to *Hay* v. *Skene*. (2)

Johnston v. *Wallace* (3) is another case of a man without a Scottish settlement—he was an Irishman by birth—deserting his wife. It was decided on the authority of Carmichael, the Lord President Inglis remarking that he could not say that that decision obtained any support from him, "but it is now a settled rule."

Now, down to this point it cannot be said that there was any decision or even dictum to the effect that the same rule would be applied where the deserting husband had a Scottish settlement. But, curiously enough, this was said afterwards, obiter in *Greig* v. *Simpson* (4), by Lord President Inglis, who had most strenuously resisted the rule which he now yielded to, but it was said in a case in which the dispute was between the birth settlement of the husband (of course, Scottish) and his alleged residential settlement (also, of course, Scottish), said, too, on the authority of a decision—*Beattie* v. *Greig* (5)—about a deserting Englishman.

Greig v. *Simpson* (4) accordingly seems a rather significant

(1) 3 M. 707.
(2) 12 D. 1019.
(3) 11 M. 699.
(4) 3 R. 642.
(5) 2 R. 923.

case. The "rule" that desertion is equal to death had now hardened into inflexibility, and had lost all relation to its original principle. The question to be decided was whether by efflux of time (five years), during which the man was de facto absent from the parish where he had acquired an industrial settlement, he had not lost it; and the decision was that, having deserted his wife, he must be held to have been dead and therefore not absent, and not to have lost the settlement. The great lawyer who thus followed and extended decisions from which he had vigorously dissented cannot but have seen in this application of the rule a new confirmation of his original opinion that it had "no reasonable or intelligible ground."

This closes the catena of cases on which the respondents rely. Of them all there is but one, *Masons* v. *Greig* (1), where, on any possible view of the facts, the deserting husband had a Scottish settlement. The most definite statement of judicial opinion in favour of the respondents on the case of a deserting husband having a Scottish settlement occurs, as I have shewn, in a case where neither of the disputants represented either the wife's maiden settlement or her residential settlement, and where, therefore, the vital element in the present controversy was wanting.

In these circumstances, on a review of the authorities, *Gray* v. *Fowlie* (2) stands out as the only decision directly determining the present question, and it is a decision of the whole Court. Its authority might be adequate for the decision of the present appeal. But some of the more recent judgments on which the respondents rely are irreconcilable with *Gray* v. *Fowlie* (2), and the "rule" that "desertion is death" is in direct conflict with the principle of *Gray* v. *Fowlie*. (2) It seems to me to be therefore impossible to avoid dealing with the question on a somewhat broader ground than at first sight might seem adequate for the disposal of the case.

It is not necessary to go back to the origins of the poor law, but it is as well to remember that while, by the old Scots Acts, birth and residence gave statutory right to relief in the parishes

(1) 3 M. 707. (2) 9 D. 811.

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of birth or residence, the two other modes of acquiring such rights, namely, parentage and marriage, are in the words of the Lord Justice Clerk Inglis (in *M'Crorie* v. *Cowan* (1)): Engrafted on statute law by the necessary application to the statutory system of certain essential and inflexible rules of the common law in the relations of husband and wife and of parent and child. We are taken, therefore, at once to the common law of husband and wife, and the general rule about such matters as are on hand is so clear, that the only question is whether some exception arises where a wife is deserted." In order to judge of this question, however, it is needful to notice the ground of the general rule. For this purpose I am going to refer to a case, not cited at the bar, but highly relevant to the present question, in which this subject was considered by the whole Court—the case of *M'Crorie* v. *Cowan*. (1)

The question before the Court was whether the Scottish birth settlement of the wife of an Irishman, resident in Scotland, but having no settlement in Scotland, could be made liable for moneys expended on her maintenance in a lunatic asylum by the parish from which she had been sent to the asylum under the Lunacy (Scotland) Act. "To that question," said Lord Justice Clerk Inglis, "I am prepared to give an unhesitating answer in the negative, on the broad and simple ground that a married woman is in law incapable stante matrimonio to have any settlement in her own right, or independently of her husband. If her husband has a settlement, that also is her settlement. If her husband has no settlement, just as little has she. She is, in my opinion, as completely incapable of possessing a settlement in her own right during the subsistence of the marriage as she is to have a separate domicil from her husband or to enjoy any other personal status or franchise in her own right." I turn to the joint opinion in the same case of the Lord President (Colonsay) and Lords Ivory, Curriehill, Ardmillan, and Kinloch, and I find this as the ground of their judgment: "The demand is resisted inter alia on the general ground that by her marriage with Donaldson her birth settlement was suspended or put in

(1) (1862) 24 D. 723, 730.

abeyance, and that it cannot revive so long as the marriage subsists; that being a married woman she cannot have any settlement of her own, apart from her husband, or any settlement that is not his settlement; that her fate in that respect is linked to his; and that the circumstance which here occurs of her husband not having a settlement in any parish in Scotland does not exclude the application of the general rule. We are of opinion that, in reference to the present case, this defence is well founded, that it is sufficient for the decision of the settlement, and that the parish of Monkton (the wife's maiden settlement) ought to be assoilzied."

I cite these considered utterances of eminent judges as enunciations of the general law and its grounds; and the grounds are of high and peremptory principle. But occurring, as this case did, after *Hay* v. *Skene* (1), it is evident that M'Crorie was sent by Lord Justice Clerk Inglis to the whole Court because of *Hay* v. *Skene* (1), and in M'Crorie the Lord Justice Clerk Inglis declared himself "unable to reconcile the judgment now to be pronounced with the decision in the case of *Hay* v. *Skene* (1), or to save the authority of that case in pronouncing this judgment." His Lordship examined the grounds of decision in *Hay* v. *Skene* (1) and pronounced them unsound: "the loss of the maiden settlement does not depend on the acquisition of another settlement but on the complete merging of the person of the wife in that of the husband by force of the marriage."

As I am referring to *M'Crorie's Case* (2) I may explain that, as it was not a case of desertion, its bearing on the series of cases now before the House is through the principles which it laid down. But, historically, it is quite clear that it went to the whole Court because of that relation to *Hay* v. *Skene* (1); and again, that *Carmichael* v. *Adamson* (3), which occurred the following year, and which, as already seen, was a case of desertion, went to the whole Court because the Lord Justice Clerk Inglis again saw that, after the decision on M'Crorie, the rule of *Hay* v. *Skene* (1) could only be reapplied, if reapplied

(1) 12 D. 1019. (2) 24 D. 723, 730.
(3) 1 M. 452.

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at all, by the whole Court. After Carmichael the Lord Justice Clerk Inglis seems to have seen that nothing more could be done in the Court of Session, and he gave (in *Greig* v. *Simpson* (1)) free play, or perhaps more than free play, to the rule.

The general principle, then, being that the wife is disabled by marriage from having a settlement of her own, how does the fact of desertion effect a change? I have already referred to the judgment of Lord Justice Clerk Hope as containing an admirable discussion of this question, and I repeat that the common law in the case of separation goes no further towards enlarging the capacities of the wife than is required by the necessities of her efforts at self-maintenance. But all these legal facilities lead no distance towards changing her settlement, and the only reason suggested for that result, namely, the justice of making the community which—conjecturally—has profited by her residence bear the burden of maintaining her is founded on totally different considerations, not relating to the interests of the wife at all, but to the equities of parishes. But, further, what is now asked is that we should hold that the fact of desertion operates as a release of the liability of the wrong-doer's parish and deprives the wife of her claim against that parish. I cannot say that I think this a very rational proposal, but it is at least plain that it bears no relation to the aid given by the law to separated wives, and can claim no support from that chapter of law. I may add that the inapplicability to the present question of the common law appealed to is further illustrated by the fact that that law so invoked is at once too wide and too narrow for the present case. In some of the aids given to separate wives the law takes no account of the reason of separation, while in others the husband must be abroad in order to give rise to them.

My Lords, it seems to me that the true principle to be applied in all these cases is that laid down by the Lord Justice Clerk Inglis in *M'Crorie's Case* (2); that it is of universal application, and that adherence to this principle is the only solution of the numberless complications which otherwise

(1) 3 R. 642. (2) 24 D. 723, 730.

arise. The same rule which was laid down by your Lordships' House in *Adamson* v. *Barbour* (1) in the case of children applies to the wife. The wife is a part of the husband's family. The fact of the husband's desertion cannot avail to alter his own parish's liability for wife any more than for children. But the existence of children in the present case affords another test of the question. One of the children, Catherine, was living with her mother in the appellant's parish. In which parish is Catherine's settlement—in her father's or her mother's? This challenge was not met by the respondents, and their difficulty in answering it is increased by the fact that there are other four children who have not been living with their mother. Where is their settlement? The only way in which these questions can be answered rationally and in accordance with *Adamson* v. *Barbour* (1) is by keeping the whole family to the settlement of its head.

I regret that it should be necessary to pronounce a judgment which may disturb a certain amount of practice, and I entirely share the reluctance of the learned judges to unsettle poor law decisions. But what has already occurred has shewn how an erroneous maxim once asserted is drawn into analogies and deductions alien even to its original conception. The only safeguard against such consequences is adherence to clear and dominant principles, and I have the satisfaction of knowing that the motion which I support does no more than re-establish the doctrine of the earliest and most authoritative Scottish case upon the subject.

LORD LINDLEY. My Lords, *Gray* v. *Fowlie* (2), decided in 1847 by the Court of Session, is a clear and unmistakable decision that by the law of Scotland a deserted wife cannot, while her husband is alive, acquire by residence an independent settlement of her own. The law of England is clearly the same: see Burn's Justice of the Peace, title "Poor," chap. xix. s. 3, vol. iv. p. 322 (ed. 1869). As in England, so in Scotland the husband's settlement, if he has one, is his wife's. *Gray* v. *Fowlie* (2) is undistinguishable from the case now under appeal,

(1) 1 Macq. 376. (2) 9 D. 811.

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Lord Lindley.

and, unless your Lordships are prepared to overrule *Gray* v. *Fowlie* (1), this appeal must be allowed.

The whole difficulty in the case arises from the fact that there are several Scottish decisions since *Gray* v. *Fowlie* (1) which have more or less departed from the principle on which it is founded. Lord Robertson, whose judgment I have read, has traced the origin and progress of the departure from that principle, and I can add nothing to what he has said.

In my opinion the judgment of Lord Young was right, and this appeal ought to be allowed.

Ordered that the interlocutors appealed from be reversed, and that the respondents do pay to the appellants the costs both here and in the Courts below.

Lords' Journals, May 15, 1902.

Agents for appellants: *Burchells & Co., for H. B. & F. J. Dewar, W.S., Edinburgh, and Montgomerie & Flemings, Glasgow.*

Agents for respondents: *Grahames, Currey & Spens, for Charles George, S.S.C., Edinburgh, and R. P. Lamond & Turner, Glasgow.*

(1) 9 D. 811.

[PRIVY COUNCIL.]

EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY, LIMITED } PLAINTIFFS;

AND

CAPE TOWN TRAMWAYS COMPANIES, LIMITED . . . . . } DEFENDANTS.

J. C.*
1902
Feb. 26, 27, 28;
April 18.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of Cape of Good Hope—Act 22 *of* 1895, *s.* 4—*Act* 29 *of* 1896, *s.* 4—*Construction—Electric Leak—Escape of Electric Current—Disturbance to Submarine Cable.*

The principle of *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330, is not inconsistent with the Roman law. It imposes a liability on a proprietor which is measured by the non-natural user of his own property, not by that of his neighbour. It applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force.

In an action for damages by the appellant company for disturbances in the working of their submarine cable caused by an escape of electricity stored by the respondents for the due working of their tramway system:—

Held, in regard to that section of the tramway which had not been constructed under statutory authority, *Rylands* v. *Fletcher* did not apply, because the disturbances only resulted when the cable was constructed without certain precautions, which the evidence shewed had subsequently secured its immunity:

Held, in regard to those sections of the tramway which had been constructed under statutes (Act 22 of 1895 and Act 29 of 1896), that the escape of electricity, being a natural incident of the operations legalised thereby, and not resulting from a leak within the meaning of the statutory undertaking or condition, did not impose liability on the respondents.

APPEAL from a decree of the Supreme Court (March 13, 1900) dismissing the appellants' action with costs.

This action was brought by the appellants, who maintain and work a submarine cable landing in Cape Town, against the

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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respondents, who maintain and work a system of electric tramways in Cape Town and its suburbs, for damages for disturbance of the appellants' cable messages caused by the working of the respondents' tramways, and for an injunction to restrain the respondents from working their tramways in such a manner as to interfere with the appellants' cable messages.

The appellants are incorporated under the English Companies Acts, and carry on the business of transmitting telegraphic messages by submarine cable between Cape Town and Europe. One of the appellant company's cables (known as the Western Cable) after leaving Loanda, on the West Coast of Africa, and after passing through the waters of Table Bay, reaches a cable hut on the shore near the Central Jetty, Cape Town, whence communication is established by land wires with an office in the Standard Bank Building, Cape Town, where the messages are received and recorded, and whence they are also despatched.

The respondents, the Metropolitan Tramway Company, Limited, the Southern Suburbs of Cape Town Tramway Company, Limited, and the City Tramway Company, Limited, are three limited liability companies incorporated respectively under Acts Nos. 22 of 1895, 29 of 1896, and 24 of 1881, and carrying on the business conjointly under the style of the Cape Town Tramways Company, Limited, of the construction, equipment, and working of tramways in Cape Town and its suburbs.

The short piece of tramway line between the toll-bar and Mowbray Cemetery was constructed and maintained without express statutory authority, but with the consent of the authority in whom the roads are vested.

Since August, 1896, the respondents employed electricity as a motive power for propelling their tramcars, and for the purpose of obtaining the necessary electrical power the respondents jointly erected a generating station situated within the municipality of Cape Town. The electric current is conveyed from the generating station by means of overhead insulated wires running parallel to the tram-lines; each tramcar carries an arm or trolley, the end of which slides along the overhead wires and forms electrical connection therewith; the electric

current passes from the overhead wires through the arm and through the electric motor carried by the car and returns to the generating station partly through the tram-rails and partly through the earth, the rails not being insulated from the earth. The respondents obtained the consent of the divisional council as well as that of the municipalities in their several districts to the aforesaid use of the tram-rails for the return current on all sections of their lines.

The appellants' cable is made up of an inner core of copper surrounded by an insulating substance such as gutta-percha, which is surrounded and protected by a sheathing of uninsulated iron wires. In transmitting a message by cable a series of very small electric currents of short duration are sent along the copper core of the cable from the distant transmitting station to the receiving station in Cape Town, where they cause by induction other currents to pass through recording instruments and return to the transmitting station partly through the iron sheathing of the cable and partly through the earth or sea.

From the laying of this cable in 1889 till 1896, when the respondents' tramway system was opened, no difficulty was experienced in its working. As soon as this system came into force, disturbances to the signals received from the cable occurred, and were of so serious a character as to render the working of the cable impossible whilst the tramcars were running. The starting, stopping, and alteration of speed of each car was attended by the production of a false signal upon the receiving instruments at Cape Town. The disturbances were said to have increased with every increase in the length of line opened.

The appellants contended that the damage of which they complained was covered by s. 4 of Act 22 of 1895, and s. 4 of Act 29 of 1896, under which Acts the respondents work their tramway system of electricity. Sect. 4, sub-s. (*d*), states that "The company specially undertakes that, in the event of any electric leak taking place, and any damage thereby being caused at any time by electrolysis or otherwise, it will reimburse and make good to the council or other body or person all costs, damages, and expenses to which the council or other body or

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person may be put by reason thereof; and provided further that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electrical current without the consent of the council first had and obtained." The corresponding sections of the other Acts, under which the tramways were constructed, do not materially differ from the above section.

The respondents contended that the escape of electricity from the tram-rails to the earth and thence into the appellants' cable did not constitute a "leak" within the meaning of the Act. The respondents further contended that the words of the Act giving a remedy for damage "caused at any time by electrolysis or otherwise" did not cover the sort of damage caused to the appellants. The respondents contended that the words "or otherwise" only included things ejusdem generis with electrolysis.

To this the appellants answered that the word "leak," whether as ordinarily used by electricians and others or as used in this Act, meant an escape of electricity from the conductor provided to carry the electricity, and that in this case such electricity escaping from the rails which were intended to carry the current, and finding its way into the appellants' cable, which was not intended to carry such current, was a leak within the meaning of the section. They further contended that the words "or otherwise" as used in this section were intended to be comprehensive, and not intended to be cut down to the narrow meaning contended for by the respondents.

Further, as regards the portion of the respondents' trams from the toll-bar to Mowbray Hill, which portion was not laid or worked by the respondents under any statutory authority, the appellants contended, upon the principle established in *Rylands* v. *Fletcher* (1), that the respondents in bringing electricity upon their tram-rails and causing damage by allowing it to escape into the appellants' cable were liable. The Supreme Court (2) held that "leak" in the Act did not

(1) L. R. 3 H. L. 330. (2) See 17 Sup. Ct. Rep. 95.

comprise the escape of current from the rails; that the words "or otherwise" only included material physical damage; that the damage done to the appellants was too remotely the consequence of the respondents' acts, and that the respondents were not guilty of the "culpa" which the Roman-Dutch law requires the plaintiffs to prove.

Bousfield, K.C., A. J. Walter, and *Sinclair*, for the appellants, contended that, as regards the tramway systems operated by the respondents under statutory authority, the damage sustained by the appellants was within s. 4 of Act 22 of 1895 and of s. 4 of Act 29 of 1896, since the escape of electricity which caused the damage, passing as it did from the tram-rails into the appellants' cable, was a leak within the meaning of the said Acts. What happened was shortly this. The electric current which passed through the motor of a tramcar ought to return, if the system was properly constructed, all of it, or practically all of it, by way of the tram-rails to the central station. Instead of that, a larger proportion of it, even amounting to about 30 per cent. in some cases, left the rails and returned by way of the earth and sea. The result was that a large portion of such current made its way into the sheathing of the cable in Table Bay, and so found its way back to the station. But the starting and stopping of the tramcars caused sudden variations in the total current. The result of this was that similar variations took place in the current passing through the sheathing of the cable. These variations in their turn induced other variable currents in the conductor of the cable which, by disturbing the proper signalling currents which passed through the conductor, caused the signals received to be confused and unreadable. All this was the necessary and direct, and not the remote, consequence of the escape of electricity from the respondents' tramway system, which escape was a leak within the meaning of the sections. The common law applies to part of the tramway, and aids in the construction of the statutes. It rests on *Rylands* v. *Fletcher* (1), affirming the judgment of Blackburn J. in L. R.

(1) L. R. 3 H. L. 330.

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1 Ex. 265, 279; *National Telephone Co.* v. *Baker* (1); *Reed* v. *De Beers Consolidated Mines.* (2) Within the principle of those cases, there is no distinction between electric power and any other escaping force.

Then, as regards the construction of the statutes, it is contended that they are declaratory of the common law. Large powers are given to the defendants on condition of liability, if electric force escapes from the rails. As for the words 'electrolysis or otherwise" the largest construction must be given, for it is known that electrolysis is sui generis, and if "otherwise," is strictly construed as ejusdem generis it has no meaning. It must include electric force of every kind. Reference was made to ss. 18, 19, and 20 of the Patent Act (1883), as construed in *Lang* v. *Whitecross Wire and Iron Co.* (3); *Richmond Hill Steamship Co.* v. *Trinity House* (4); *Anderson* v. *Anderson* (5); *Skinner* v. *Shew & Co.* (6)

As regards the Roman-Dutch law, that adopts the principle laid down in *Rylands* v. *Fletcher* (7): see that case cited in *Victoria Diamond Co.* v. *De Beers Diamond Co.* (8), and see Van Leeuwen (ed. 1820) dealing with Grotius, p. 493, c. 39, s. 1, and p. 494, c. 39, s. 6; Kotze's Translation of Van Leeuwen, note to bk. 4, c. 39, s. 6; Hunter's Roman Law, p. 254.

Cohen, K.C., Fletcher Moulton, K.C., and *T. C. Graham*, for the respondents, contended that the disturbances caused to the appellants' cable were not caused by an electric leak within the meaning of the sections referred to. It was admitted that the whole of the tram-lines in question were constructed and worked as constructed with the consent of the council or authority having control over the roads. Accordingly, the respondents are protected in the working of their tramways by those Acts. Even if the escape of electricity had been through a leak within the meaning of those sections, the damage of which the appellants complained was not caused by electrolysis or otherwise within the meaning of those sections. The

(1) [1893] 2 Ch. 186.
(2) (1892) 9 Sup. Ct. Rep. 333.
(3) 7 Rep. Pat. Cas. 389, 392.
(4) [1896] 2 Q. B. 134.
(5) [1895] 1 Q. B. 749.
(6) 10 Rep. Pat. Cas. 5; S.C. [1893] 1 Ch. 413.
(7) L. R. 3 H. L. 330.
(8) 1 Sup. Ct. A. C. 300.

evidence shewed that long before the disturbances complained of there was a complete and well-known and very inexpensive remedy for them, which the appellants might have applied at once. That remedy consisted as follows: to lay a twin-core shore-end cable from the shore out to sea, and to connect the two conductors of this twin-core cable to the core and to the sheathing of the main cable respectively at a point outside the area of the disturbance in a particular manner as described by the witnesses. Instead of adopting that course, the appellants performed many expensive experiments, some of which were total failures, and others only partially successful, and then sought to charge those experiments against the respondents as well as damages for loss of business due to the disturbances. The Supreme Court was right in holding that the respondents had not infringed any legal right of the appellants as known to the law of the Colony. The damages which they have sustained were the consequence of their own acts or default, and were not caused by any interference on the part of the respondents with their rights.

Under Roman-Dutch law the principle of *Rylands* v. *Fletcher* (1) does not apply to a case of this sort. There was not such a degree of culpa on the part of the defendants as to render them liable under that law. The damages resulting from the defendants' operations were too remote. It was indirect damage caused by the subtle escape of electric current into the earth with no other tangible effect than the disturbance of an extremely delicate telegraphic apparatus. Neither under Roman-Dutch law nor under the common law of England had the appellants a legal right to have their apparatus guaranteed at the respondents' expense from the slightest disturbance, more especially when the appellants could by taking reasonable precautions have protected themselves. Reference was made to *Robinson* v. *Kilvert* (2) and to *Cumberland Telephone Co.* v. *United Electric Ry. Co.* (3) The appellants cannot increase their common law rights by availing themselves of the increased delicacy of the instruments at their disposal, or by

(1) L. R. 3 H. L. 330. (2) (1889) 41 Ch. D. 88.
(3) (1890) 42 Fed. Rep. 273, 284.

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applying their property to special uses. If the respondents were shewn to be guilty of negligence, that would impose liability; if the appellants were injured in the ordinary enjoyment of their property, they would be entitled to protection; but they cannot by reason of the peculiarity or delicacy of their trade apparatus claim an extension of the principle of *Rylands* v. *Fletcher* (1), seek a higher degree of protection than belongs to ordinary owners, or gain a more extensive right to limit those operations of their neighbours which may be carried on without liability for all consequences which may ensue.

Then as to statutory liability, the true construction is that there must be an electric leak, and damage caused thereby, by electrolysis or otherwise. The word "leak" has not a technical meaning, but is used in a popular sense. A hole in the gutta-percha round the cable would be a leak. It does not include the unavoidable escape of current from the rails. It implies something abnormal, something which can be remedied —not something which is inevitable and cannot be stopped. As for electrolysis or otherwise, it was contended that the doctrine ejusdem generis applied. The real meaning of the condition is that statutory powers would not protect the respondents in any act of theirs which amounted to a nuisance at common law. There is no suggestion in this case of a breach of condition; and if there had been, it does not follow that a breach of condition necessarily affects the rights of the parties.

Bousfield, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. The question raised by this appeal is whether the respondents are liable in damages for certain disturbances in the working of the appellants' submarine telegraph cable at Cape Town. That such disturbances did take place, that they were caused by electricity which had been stored by the respondents and used in propelling their tramcars in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in

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the sea near Cape Town, and that pecuniary losses resulted, are matters beyond dispute.

In order to the adequate understanding of the question thus raised, it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the respondents' system, it be in the first place stated how the electricity injured the appellants. At some point then in Table Bay this electricity, having escaped and being at large, was attracted by the appellants' cable, entered the sheathing of the cable, and by the sheathing, as a conductor, found its way back to the tramway central station whence it had started, and thus completed its circuit. While travelling along the sheathing of the appellants' cable, the current varied very frequently and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and but for this the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with, and as recorded were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption.

In order to complete the description of the nature of the injury, it is necessary to add that the difficulty has now been completely got over by laying what is called a twin-core cable for several miles out, the two wires rectifying one another's action. Now that this has been done, the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this, however, it is unnecessary further to enter, as the quantum of damage is not raised in this appeal, but only the question of liability.

Turning now to the mode of escape of the electricity from the tramways, there is again no controversy; and for present

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purposes a succinct statement is sufficient. The respondents' tramway runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolly. All that is necessary to take note of is that the electricity which is used is generated at a power-station erected by the respondents for that purpose, and that the conductor which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated (and safety requires that this should be their condition) the rails are so far from being (even comparatively speaking) a perfect conductor that necessarily, and as matter of course, a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was which reached the appellants' cable.

Upon these facts the appellants' main contention is that, on the principle of *Rylands* v. *Fletcher* (1), the respondents are liable for the interruption of the appellants' business, and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this the respondents have a twofold answer: (1.) they say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of Colonial statutes incorporating their constituent companies; and, (2.) as regards the part of their line not so protected by statute, they maintain that *Rylands* v. *Fletcher* (1) does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their Lordships' bar), namely: (1.) that the law of *Rylands* v. *Fletcher* (1) has no place in the Roman-Dutch law, and (2.) that it was not established that any escape of electricity injurious to the appellants took place from that section of the tramway to which none of the statutes apply.

Before proceeding to discuss the interesting and important questions thus raised, a few facts and dates may conveniently be noted. The appellants' cable had been in operation for

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years before the respondents' tramways were made. The tramcars began to be worked in August, 1896, and the disturbances on the appellants' apparatus were felt at once and continuously thereafter during the days and hours when the tramcars were running. Communications took place between the parties, and both seem to have frankly co-operated in ascertaining the cause of injury and devising remedies. After this had been done, with the result already stated, the present suit was instituted, on April 15, 1899, in order to determine the question of liability. On March 13, 1900, the Supreme Court of the Colony gave judgment for the respondents, and the present appeal is against that judgment.

In considering the merits of the appeal, it is best first to take the question of common law. That the facts about the section of tramway line not constructed under statutory authority, namely, that from the city boundary to Mowbray, do raise this question is in their Lordships' judgment sufficiently clear. It is true that the crucial test of this particular section being worked alone is awanting; although at one time during the disturbances of the cable this section and the short section home to the station-house were worked alone. But no effective answer was made to the record of journeys which was commented on by Mr. Bousfield; and this record attests that the disturbances on this section were at least as great as on any other. Now Mr. Jacob, the respondents' principal witness, is very emphatic in stating (and indeed this is of the essence of the respondents' case) that the disturbances on the cable are not dependent on the quantity of the current escaping, but on the rate of alteration and the rate of variation, and Mr. Jacob's evidence, when directly applied to the separate influence of one section, entirely supports the appellants' case. The question of common law is thus raised directly (as well as indirectly in relation to the just construction of the statutory provisions).

Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands* v. *Fletcher* (1) of the kind of things which a proprietor can only

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do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands* v. *Fletcher* (1), and the principle would apply.

But this is only one-half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Rylands* v. *Fletcher*? (1) Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property. Now the kind and degree of interference with the respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to, not because their Lordships consider that the respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as shewing that it cannot be predicated of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now, if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all.

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The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands* v. *Fletcher* (1), which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as shewing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

While agreeing in the result with the Supreme Court on the common law branch of this case, their Lordships are not prepared to accede to some of the comments made on *Rylands* v. *Fletcher*. (1)

The learned judges of the Supreme Court have indicated considerable reluctance to accept the doctrine of that case, and seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the Colony is based. Their Lordships are unable to find adequate grounds for this view, and it was not maintained at the bar. It is not

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supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor, on the other hand, does the prominence given to culpa in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the civil law. The learned judges, and also Kekewich J., in *National Telephone Co.* v. *Baker* (1), seem to have been inaccurately informed on this point; for as matter of fact not only is the principle of *Rylands* v. *Fletcher* (2) fully accepted in Scotland, but it had formed part of the law of Scotland before *Rylands* v. *Fletcher* (2) was decided, and *Rylands* v. *Fletcher* (2) has been treated by the Scottish Courts as an authoritative exposition of law common to both countries.

So far, then, as the respondents' liability is governed by the common law, their Lordships, on the grounds already stated, do not consider the appellants' claim to be maintainable. It remains to consider the liabilities of the respondents for the escape of electricity on those sections of their line which have been constructed under statutes.

The provisions of the several statutes authorizing the several sections are identical; and s. 4, sub-s. (*d*), of Act 22 of 1895 has been taken as the text of the argument. The statutes have, of course, direct and express relation to electricity as the motive power. The company under those statutes have right to maintain and work all necessary power and stations, subject to the approval and in accordance with any resolution or standing order of the council of the city of Cape Town, "Provided that . . . . the company specially undertakes that in the event of any electric leak taking place and damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the council or other body or person all costs, damages and expenses to which the council or other body or person may be put by reason thereof; and provided further that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electrical

(1) [1893] 2 Ch. 186. (2) L. R. 3 H. L. 330.

current without the consent of the council first had and obtained." The consent of the council to the use of the rails for the return current was had and obtained under certain conditions, of which the 4th is as follows:—

"4. If at any time and at any place a test be made by connecting a galvanometer or other current indicator to the insulated return and to any pipes in the vicinity, it shall always be possible to reverse the direction of any current indicated by interposing a battery of three Leclanché cells, connected in series if the direction of the current is from the return to the pipe, and by interposing one Leclanché cell if the direction of the current is from the pipe to the return. If at any time a greater leakage is discovered than would render it possible for the current to be reversed in the manner above indicated, the same shall be localised and removed as soon as practicable, and the running of the cars shall be stopped unless the leak is so localised and removed within twenty-four hours."

The first question, then, is, Was it a leak, either in the sense of the statutory undertaking or of this condition, that sent out this electricity which reached the cable? For if so, the stipulated liability has been incurred. Their Lordships are unable to think that it was. The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus not contemplated as a condition of the working of the system. But the departure of the electricity from the rails arose from no defect, but from the necessary condition of things, if the tramcars were to run and the rails to be used as a return. The evidence shews clearly that, if uninsulated (as was the case here), the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going afield. Giving to the word "leak" whatever expansion may be appropriate to its extension to electricity, their Lordships do not consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalised under the statutes.

The argument of the respondents on the words "or otherwise," as limited by the preceding word "electrolysis," did not

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command their Lordships' assent; but it is superseded by the other grounds of judgment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the judgment of the Supreme Court affirmed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Bircham & Co.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

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MAYOR, &c., OF WELLINGTON . . . APPELLANTS;

AND

JOHNSTON AND ANOTHER . . . . . RESPONDENTS.

MAYOR, &c., OF WELLINGTON . . . APPELLANTS;

AND

LLOYD AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

New Zealand Public Works Act, 1894, s. 44—*Omission to give Notice of Non-admission of Claims—Jurisdiction—Relief.*

The appellants, having expropriated the lands of the respondents under the New Zealand Public Works Act, 1894, inadvertently omitted to give them notice, under s. 44, of non-admission of their claims for compensation within sixty days of receiving the same; and accordingly the respondents filed copies of their claims, with receipts for the service thereof, in the Supreme Court:—

Held, that, the claims having thereupon become enforceable awards under the Act, the appellants were not entitled, under the Act or otherwise, to any relief against the consequences of their omission.

TWO APPEALS heard together from orders of the Court of Appeal of New Zealand (March 18, 1901) discharging two motions by the appellants to set aside in each case the copy

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

of a claim for compensation for lands taken by the appellants under compulsory powers, which had been filed by the respondents in the Supreme Court under the Public Works Act, 1894 (58 Vict. No. 42). The respondents in the first case claimed 12,500*l.* in respect of their half-share in the said lands; those in the second case claimed, as trustees of a fourth share, 5500*l.*

The sixty days limited by s. 44 of the said Act for delivery of notice of non-admission of the said claims expired on January 18 and February 6, 1901. The appellants alleged that they never admitted or intended to admit the claims (which largely exceeded the highest valuations made by the valuers appointed by the appellants), their town clerk inadvertently overlooked the same, and accidentally omitted to give notice of the non-admission thereof within the specified time, and on January 25 and February 21, 1901, the respondents filed copies of their claims in the Supreme Court.

On March 12, 1901, the appellants gave notices of motion to set aside the copies of the claims so filed as aforesaid, so that the same might become void and of no effect as an award within the meaning of the said Act of 1894, notwithstanding the provisions of s. 44 of the said Act.

The Supreme Court (Stout C.J., Denniston and Cooper JJ., Edwards J. dissenting) discharged the motions. In his judgment Stout C.J. said that if the Court had jurisdiction to remove the claims from the file and to extend the time for the appellants to object thereto it should do so; but that the majority of the Court considered that the Court had no such jurisdiction.

Sir R. T. Reid, K.C., and *Northcote*, for the appellants, contended that the Court had jurisdiction to remove the copies of claims. Filing them was a proceeding, or a step in proceedings, with a view to the claims becoming operative as judgments of the Court. There was accordingly an inherent jurisdiction to set that proceeding aside on such terms as were fair and equitable. After the lapse of a specified time the claims matured into judgments of the Court, and there was inherent jurisdiction to see that those judgments had been fairly

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obtained, and if it appeared that they had not been fairly obtained to set them aside or refuse to enforce them. The Arbitration Act of 1890 applied to these claims in their character of awards, and, if inherent jurisdiction failed, there was the same jurisdiction to set those awards aside, or otherwise deal with them, as there is under that Act to set aside or deal with other awards. The omissions to give the requisite notices of non-admission were purely accidental, and it was inequitable that the claims should be enforced.

English Harrison, K.C., and *Knight*, for the respondents in the first case, contended that they, having fulfilled all the conditions required by s. 44 of the Public Works Act, had acquired a statutory right to the compensation claimed. They had strictly observed all the prescribed conditions. The service of their claim had been duly and properly made on the appellants. There was a sufficient receipt for the service. The copy of claim had been duly filed after the sixty days had elapsed. The Court had no power to alter the provisions of s. 44. It had no jurisdiction to extend the time mentioned in the Act for objecting to the amount of the claim; for the Act had not provided for the contingency of omission within the prescribed time. To do so would be to alter its provisions. It could not direct that the objection which came too late should be deemed to have been made within the sixty days. There was consequently no jurisdiction to interfere with the respondents' absolute right to enforce their award.

Haldane, K.C., and *L. M. Richards*, for the respondents in the second case.

Sir R. T. Reid, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. These two appeals were heard together. They raise one and the same question: Can a local authority, having taken land under the Public Works Act, 1894, having received a claim for compensation from the late proprietor, and having omitted to challenge the amount of the claim within the period prescribed by the Act, obtain relief in a Court of law against the statutory consequences of such omission?

In New Zealand, under the Public Works Act, 1894, the expropriation of lands required by a local authority for public works is rather a summary process. A survey is made, and a plan prepared and deposited, and then notices are gazetted calling "upon all persons affected" to set forth in writing any "well-grounded objections" to the taking of the lands. An "objection to the amount or payment of compensation" is not to be deemed a well-grounded objection.

If no objection is made within the prescribed time, or if after due consideration of all objections the local authority is of opinion that it is expedient that the proposed works should be executed, the land is to be taken in the manner set forth in s. 18. That section authorizes the Governor, after the preliminary requirements of the Act have been complied with, to declare by proclamation that the lands (a list of which is to be contained in or annexed to the proclamation) are taken for the public work therein mentioned. And then from and after a day named in the proclamation the land becomes absolutely vested in the local authority, "discharged from all mortgages, charges, claims, estates, or interests of what kind soever, for the public use named in the proclamation." Part III. of the Act, beginning with s. 34, deals with the subject of compensation. Any person claiming compensation (in the Act styled "the claimant") is to serve upon the local authority (styled "the respondent") a claim in writing in one of the forms in the 2nd schedule to the Act, stating among other things the total amount claimed and the name and address of the claimant. It is provided (s. 42, sub-s. 2) that the claim shall be served by being left at the office of the local authority or sent by registered letter to its office, and that "the claimant shall be entitled to receive from the officer for the time being in charge of any such office a receipt stating the day on which such claim was delivered or received."

Sect. 44, on which the question at issue in this case depends, is in the following words:—

"If the respondent does not, within sixty days after receiving such claim, give notice in writing to the claimant that he does not admit it, the claimant may file a copy of his claim, together

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with the receipt for the service thereof, in the Supreme Court; and such claim, when so filed, shall be deemed to be and shall have the effect of an award filed in the Supreme Court, and may be enforced in the manner provided in section seventy-six."

If the respondent gives notice in writing within the said sixty days that he does not admit the claim, or if the claimant does not accept the respondent's offer, assuming that an offer is made by the respondent, provision is made for having the question determined by a Court styled "the Compensation Court." Where the claim exceeds 250*l*., the Compensation Court consists of two assessors, one named by each party, and a judge of the High Court as President.

Then follow provisions as to the hearing of the case and the making of the award. Sect. 76, which is referred to in s. 44, is in the following terms:—

"76. (1.) The Court shall make its award in writing, which shall be drawn up and signed by the President as soon as conveniently may be after the making thereof; and the President shall deliver or transmit the same to the Registrar of the Supreme Court, to be by him filed in the said Court.

"(2.) The Court may, within one month after making the award, reverse, alter, or modify the same; and may hear such evidence and make such order as to costs or otherwise as the Court may deem best.

"(3.) Such award shall be final as regards the amount awarded, but shall not be deemed to be final as regards the right or title of the claimant or any other person to receive the same or any part thereof.

"(4.) But if the sum awarded be not paid into the Public Trust Office, under sub-section one of section twenty-seven, within sixty days after the filing of the award in the Supreme Court, the award so made and filed shall have the effect of a judgment of the Supreme Court and may be enforced accordingly, subject, however, to the provisions of this Act."

The facts in both the cases under appeal are very simple and not in dispute. Certain lands belonging to the respondents were required by the corporation of the city of Wellington for

public improvements. They were taken under the Act of 1894, and the respondents were dispossessed. In due course they sent in a claim in accordance with Sched. II. of the Act, stating amongst other things the total amounts of their respective claims. The period of sixty days mentioned in s. 44 of the Act expired without notice being given by or on behalf of the corporation that they did not admit the claim. In due course the respondents filed copies of their claims, together with receipts for the service thereof in the Supreme Court. Thirty-one days in the one case and fifteen days in the other after the expiration of the statutory period the town clerk discovered that he had allowed the time prescribed by the Act to elapse. He applied to the solicitors of the respondents, stating that the failure of the council to give notice that the claim was not admitted was due to an omission on his part, and begging them to ask their clients to withdraw the claim and allow the matter to go to the Compensation Court. This proposition was declined. Thereupon the council gave notices of motion in the Supreme Court, asking in each case for an order to set aside the claim "so that the same might become void and of no effect as an award within the meaning of the Act of 1894, notwithstanding the provisions of section 44 of the Act." The first and principal ground alleged in each case was "that the corporation did not admit the said claim, and that the omission of the corporation to give notice to that effect to the claimants within sixty days after the receipt of such claim was accidental and entirely due to inadvertence."

The motions were by consent removed into the Court of Appeal. That Court (dissentiente Edwards J.) discharged both motions with costs.

The case was argued before this Board on behalf of the appellants with great ability and earnestness; but, notwithstanding the opinion of the learned judge who differed from his colleagues, the question appears to their Lordships to be too plain for argument. Edwards J. described the conduct of the respondents, who did no more than what the Act of Parliament authorized and directed them to do, as "an attempt to snatch a judgment" and "an abuse of the process of the Court."

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The learned counsel for the appellants did not use language so inappropriate. Everybody, he said, was liable to make a mistake; the slip in the present case was one which a hard-worked official in the pressure of business might be excused for making; after all, no injustice would be done if claims which his clients on sworn testimony regarded as extravagant were referred to the Court specially constituted to take cognizance of such questions. So far their Lordships are not concerned to differ from the view presented to them, and it may be taken for granted that the respondents' claims, whether they are or are not so extravagant as the appellants represent them to be, are probably in excess of any amount which could be established on reference to arbitration. An evicted proprietor demanding compensation from a wealthy corporation may be trusted to make the most of his claim. But this is not the question. The question is—Has any Court the right to deprive the respondents of the advantage which the law of the land gives them? The scheme of the Act is not unreasonable. The local authority initiate the proceedings. They dispossess the person whose land they want. They dispossess him without paying down or securing anything in the shape of compensation. They leave him to make his claim. Is the period of sixty days too short a time to enable the local authority to make up their minds whether they will admit his claim or not? If they do not admit it, they have nothing to do but to say so. It was said that Parliament has overlooked the possibility of a slip. It has certainly made no provision for a slip in the case of a local authority setting the Act in motion. It has made provision for a slip in the case of a claimant who has received notice that his claim is not admitted failing to make the next move in due time. But that is a different case altogether. It is not unreasonable to require that public bodies putting in force an Act of Parliament for their own purposes should attend to its provisions. It would be contrary to natural justice to deprive a claimant whose land has been taken from him of all compensation because he makes a slip which cannot prejudice the other side. But even in that case the claimant is not allowed to prosecute his claim

except with the leave of the Compensation Court, and upon such terms and conditions as that Court thinks fit. This special provision in the case of a claimant tells against rather than for the appellants' contention.

Then it was asked, Suppose the claimant had been guilty of fraud, would there be no remedy in that case? Certainly there would be a remedy. Courts of justice have an original and inherent jurisdiction to relieve against every species of fraud, but it may be that the relief would have to be sought in an independent action. It was admitted by Sir Robert Reid that the slip which occurred in this case was not a mistake against which relief could be obtained in a Court of Equity. His argument was that when the claim was filed in the Supreme Court it came under the control of the Court, and that just as Courts of Law and Equity before the days of statutory rules and orders could deal with their own procedure and enlarge the time for taking any step in an action, and set aside on such terms as they thought fit a judgment obtained by default, so the Supreme Court in such a case as this ought to set aside the award and enlarge the time, and, by some process which was not clearly explained, remit the case to a Compensation Court. Their Lordships, however, cannot find in the Act any authority for such a course. The rights of the claimants were fixed by statute before the Supreme Court had anything to do with the matter. The only function of the Supreme Court was to enforce the claim as an award, and see that the money reached the proper hands. The circumstance that an award made by a Compensation Court seems to be only provisional for the space of a month under s. 76, sub-s. 2, does not assist the argument or afford any analogy for the course suggested on behalf of the appellants. In that case the Court to deal with the award during the month of grace is not the Supreme Court, but the Compensation Court.

Failing the principal ground of appeal, two other points were put forward on behalf of the appellants. In one of the cases it was said that the claim was not made as directed by the Act. The claimants were absent. Two powers of attorney were produced, one of which it was argued did not, on its true

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construction, authorize the attorney to make the claim, while the other, it was suggested, was too late. But in fact no power of attorney was required. The claim was made by an agent in the name and avowedly on behalf of the respondents, and they have ratified the action of their agent. The other objection was not more substantial. It was said that the receipt filed on behalf of the claimants was not given by the officer for the time being in charge of the office, but by an assistant or subordinate. It appears that it was in fact signed by an assistant in the office for the officer in charge and by his direction. Their Lordships are of opinion that this was a sufficient compliance with the Act. But if it was not, the respondents are now entitled to demand a proper receipt in conformity with the Act.

Their Lordships are of opinion that the appeals fail, and they will humbly advise His Majesty that they ought to be dismissed.

The appellants will pay the costs of the appeals.

Solicitors for appellants: *Bowerman & Forward.*

Solicitors for respondents in the first case: *Budd, Johnsons & Jecks.*

Solicitors for respondents in the second case: *Flower & Flower.*

[PRIVY COUNCIL.]

KARUNARATNE . . . . . APPELLANT; J. C.*

AND 1902

ELIZABETH FERDINANDUS AND OTHERS . . . . . RESPONDENTS. *Feb.* 28; *March* 1, 5, 19.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Revocation of Probate—Issue as to total Invalidity of Will—Declaration of partial Validity—Words or Clauses omitted from Probate.

Words or clauses in a will ought not to be omitted from probate except upon evidence pointedly addressed thereto and shewing their improper insertion.

Where probate granted to the appellant had been revoked on issues which impugned the validity of the will as a whole, no issue having been raised or evidence given as to its partial validity, the Supreme Court in appeal varied the decree of revocation by declaring that the deceased died intestate as to his immovable property only and expunging from the will the reference thereto:—

Held, on the evidence, that the revocation was right and that the appeal must be dismissed. There being no cross-appeal as to the modification decreed, it was nevertheless pointed out by their Lordships that it ought not to have been made except as a compromise by consent.

APPEAL from decrees of the Supreme Court (March 22, 1899, and December 6, 1899, the latter being in review) varying a decree of the District Judge of Colombo which had revoked probate of the will in suit, and declaring that the deceased had died intestate as to his immovable property only.

Probate had been issued to the appellant on December 21, 1895, of the will of her deceased husband Ferdinandus, who died on January 8, 1895. The respondents, his next of kin, obtained a decree of revocation on express findings by the District Judge that the will was not the act of a free and capable testator, and was executed under undue influence and coercion. On appeal a majority of the judges of the Supreme Court found

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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in effect that, though the testator was practically not a free agent, yet that he had sufficient intelligence and volition to be under the belief that he was merely disposing of his personalty and not of his realty. They all agreed that the will was that of a testator of sound mind, memory, and understanding, and that it was not obtained by undue influence, coercion, or fraud. But two of the judges, Bonser C.J. and Withers J., held that there was evidence to shew that testator did not intend to deal in the will with his immovable property, and, therefore, held that probate ought to be granted, but that all reference to immovable and real property should be omitted from the residuary clause. Lawrie J. did not concur in this interpretation of the testator's intention; but, in accordance with the decision of the majority, an order was made declaring that the testator died intestate as to his immovable property, and expunging from the will the references made therein to immovable and real properties.

Inderwick, K.C., and *Hinde*, for the appellant, contended that the decree of the Supreme Court ought to be varied and probate issued to the appellant of the will in its entirety. On the evidence the appellant had proved, first, that the testator was of sound mind, memory, and understanding; second, that the will was not obtained by undue influence or fraud of the appellant; third, that the testator had full knowledge of the contents and purport of the will which he executed. The Supreme Court virtually found these facts in the appellant's favour: otherwise it could not have granted probate of the personalty. It was contended that, therefore, probate should have been granted of the will in its entirety; that to exclude the realty from the residuary clauses was to dispose of the case on an issue not taken by the parties, not tried in the Court below, and not suggested even in the argument before the Supreme Court. In so doing the Supreme Court acted contrary to a well-established principle: see *The Tasmania*. (1) The will clearly dealt with both classes of property, and the whole should stand, since, if there was testamentary capacity

(1) (1890) 15 App. Cas. 223.

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with regard to one class of property, there was equal testamentary capacity with regard to the other. Moreover, the respondents accepted the view that probate should issue of the personalty, and had not cross-appealed.

Haldane, K.C., and *Corbet*, for the respondents, contended that on the evidence the document in suit was not the will of a free and capable testator; and that consequently they were entitled at the least to the relief granted by the Supreme Court in setting aside the will so far as the realty was concerned. The realty was by far the most valuable portion of the estate, and the respondents acquiesced in probate of the personalty being granted, being desirous of avoiding further costs. In support of the exclusion of the realty they cited *Rhodes* v. *Rhodes* (1); *Fulton* v. *Andrew* (2); *In the Goods of Boehm* (3); *Harwood* v. *Baker* (4); *Smith* v. *Atkins* (5); *Hampson* v. *Guy*. (6) On the question of costs, see *Mitchell* v. *Gard* (7); *Williams* v. *Henery* (8)

Inderwick, K.C., replied.

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The judgment of their Lordships was delivered by

LORD LINDLEY. The will in question in this case is dated November 10, 1894. The testator died on January 8, 1895. The will was propounded for probate by his widow as an uncontested will, and on March 1, 1895, an order was made for the grant of probate to her. Shortly afterwards the heirs of the testator entered a caveat to prevent the issue of probate to her, and proceedings were taken to impeach the will. Some difficulty arose, and some mistakes were made in the procedure; but on December 21, 1895, probate was granted to the widow, and on February 12, 1896, the heirs presented a petition for its revocation, and three issues were directed to be tried. They were as follows:—

1. Had the applicant for probate any reason to suppose

(1) (1882) 7 App. Cas. 192.
(2) (1875) L. R. 7 H. L. 448, 460.
(3) [1891] P. 247, 251; 64 L. T. 806.
(4) (1846) 3 Moore, 282.
(5) (1870) L. R. 2 P. & M. 169.
(6) (1891) 64 L. T. 778.
(7) (1863) 33 L. J. (P.) 17; S.C. 3 Sw. & Tr. 275.
(8) (1864) 33 L. J. 110; 3 Sw. & Tr. 471.

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that her application would not be opposed by the present petitioners?

2. Was the deceased, John Aron Ferdinandus, at the time he made his will, of sound mind, memory, and understanding?

3. Was the will of the deceased obtained and procured by the undue influence or fraud of the respondent, her mother, brother, and cousin?

The first of these issues was tried before the Acting District Judge (Mr. F. R. Dias) in December, 1897, who decided it in favour of the widow. Nothing turns upon it now.

The second and third issues were tried by the Permanent District Judge (Mr. Browne), and the evidence upon them was heard by him, with the exception of the evidence of Mr. F. J. de Saram. His testimony was taken by Mr. Dias, but was received by Mr. Browne with the consent of both parties.

The District Judge (Mr. Browne) on January 18, 1899, delivered a long and careful judgment, and decreed that the probate granted on December 21, 1895, to the widow should be revoked with costs.

It is material to observe that there was no issue raising the question whether the will was valid as to the testator's movable property but invalid as to his immovable property. The will was attacked and defended as a whole, and it was adjudged invalid.

From this decision of the District Judge the widow appealed to the Supreme Court; and that Court then made the following order:—

"It is considered and adjudged that the decree made in this action by the District Court of Colombo, and dated the 18th day of January, 1899, be and the same is hereby varied by declaring that the late John Aron Ferdinandus died intestate as to his immovable property, and for the purpose of giving effect to this declaration expunging from the residuary clause in the will propounded as the will of the said John Aron Ferdinandus the reference made therein to immovable and real properties. And it is further ordered and decreed that all costs be paid out of the estate."

This order is dated March 22, 1899; it was affirmed on a petition for review by an order dated December 6, 1899. From these two orders of the Supreme Court the widow has appealed to His Majesty in Council. The appellant by her petition of appeal asks, not only that these orders of the Supreme Court may be discharged, but that the validity of the will as originally propounded by her may be upheld, and that probate thereof may be granted to her. The respondents have presented no cross-appeal; they do not object to the orders as they stand, but they do object to probate of the will as executed being granted without modification.

Under these circumstances their Lordships have felt considerable difficulty in arriving at a conclusion of what ought to be done. They cannot think that the course taken by the Supreme Court was correct unless the Court was prepared to pronounce against the will, and only forbore to do so because the testator's heirs were content with less. But the Court did not say that they were prepared to dismiss the widow's appeal, and it would rather seem that they were not. If so, the order appealed from ought not to have been made, unless indeed it was the result of a compromise come to between the parties, which apparently it was not. On this part of the case their Lordships adhere to the sound principle acted upon by the House of Lords in the case of *The Tasmania*. (1)

There negligence on the part of the captain of a ship was relied upon before the Court of Appeal, although not investigated at the trial. Lord Herschell said: "I think that a point such as this not taken at the trial and presented for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by and the questions asked of the witnesses are directed to the points then suggested, and it is obvious that no care is exercised in the elucidation of facts not material to them.

"It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time if it be satisfied beyond doubt, first, that it has before it all the facts bearing

(1) 15 App. Cas. 223.

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upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box."

The second and third issues rendered it necessary to investigate the capacity of the testator and his freedom from undue influence; but practically such a general investigation is very different from an investigation of a more limited range, and pointed to the specific question whether the testator when he made his will was able to understand and understood that he was disposing of his tea and cocoa estates. This question was never raised at the trial, and, not having been so raised, their Lordships are of opinion that the will should have been upheld or set aside; and not have been upheld as to the movable property and set aside as to immovable property. In *Fulton* v. *Andrew* (1), *Morrell* v. *Morrell* (2), and other cases of that sort, where words or clauses have been omitted from the probate, the Court has always acted on evidence pointedly addressed to the words or clauses said to have been improperly inserted in the will, and it is obviously most important that this practice should not be departed from. Their Lordships, however, have the satisfaction of feeling that no injustice has been done in this case, for they have come to the conclusion that the decision of the District Judge was correct, and that the widow's appeal from it ought to have been dismissed. They have, however, thought it right to point out the objection in principle to the order appealed from in order to prevent a repetition of the mistake which has been made.

Passing now to the merits of the case, the evidence is as follows: The will on the face of it, and without extrinsic evidence, appears free from all objection, and the due execution of it is certified by the notary who prepared it. Moreover, the will was read to, and perhaps by, the testator, and he made no objection to it. Further, although the testator had had a stroke of paralysis some time before, and was weak and ill and often cried, he was considered by Mr. Keegel, a medical gentle-

(1) L. R. 7 H. L. 448. (2) (1882) 7 P. D. 68.

man who attended him, to have been capable of making a will when he signed it; and this evidence is corroborated by Mr. Bastiansz.

On the other hand, it is proved beyond all question that in the early part of the year 1894 the testator desired to make a very different will, giving one-third of his property to his illegitimate daughter, one-third to his sister, and one-third to his wife. His wife's mother remonstrated against this, and it is plain that he was prevented by his wife and her relatives from executing this will: so much so that he wanted a friend to help him to get it signed secretly. There is no reliable evidence apart from the will itself of November, 1894, that he ever changed his views as expressed in this earlier proposed will. He was fond of his sister and of his daughter, and evidently wished to provide liberally for them. During his illness he lived much with his wife's relatives, and more than once he desired to remove from where he was to another home in another part of the island. This, however, he was unable to manage, and it is plain that his wife and her relatives were unwilling that he should go away even when arrangements had been made by other friends for his removal. The testator had a considerable amount of property. His landed property was worth some Rs.109,000; he had in cash securities Rs.23,600, and he had in addition other property, making a total of nearly Rs.134,000. He knew what property he had, and took an interest in the management of his tea and cocoa estates. He himself considered that he was worth between 18,000*l.* and 20,000*l.* The proposed abortive will was prepared by a Mr. de Saram from instructions given by the testator himself. The will of November was prepared by Mr. P. Perera from instructions given by Mr. E. Boteju, the brother of the widow. Mr. Perera was known to Boteju, and at his request went to the testator and saw him in June, 1894. The testator said he would send written instructions through Boteju, and Boteju brought Perera instructions in writing some three months afterwards. These are produced. It is quite impossible to believe that those instructions should have been given by the testator; it is impossible to believe that the testator if he

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knew what he was about would have given instructions for a will based upon the idea that his property was worth Rs.26,000, or possibly more, but providing for its being worth between Rs.26,000 and Rs.20,000, and again providing for its being worth even less than that. By these instructions Rs.5000 were to be left to his sister and a like sum to his daughter.

About a week after these instructions had been given to Perera, Boteju again saw him, and gave him verbal instructions to make some alterations in the names of some of the legatees and in the amounts of some of the legacies. Perera made these alterations accordingly, and the will of November embodied them. By this will the amounts of the legacies to the sister and daughter were reduced from Rs.5000 to Rs.3000 each. Perera knew nothing about the earlier proposed will, nor did he know that the testator had any landed property, nor did he ever receive any instructions from the testator himself, although according to the evidence he was quite competent to give instructions and to understand what he was doing. When his will was read to him he seemed to be sorry and cried; but he said he had no objection, and so his signature was taken. As regards the reading of the will the evidence stands thus: The will was read over to him by the notary. Keegel, the surgeon who was present, said the testator also read it; but no other witness said this. The District Judge refers to Keegel's evidence, but apparently thought that the will had only been read over to the testator by the notary, and the Chief Justice expressed his opinion to be that if the testator read it his reading must have been of a very cursory nature. Their Lordships take the same view of the evidence on this point.

Boteju was called as a witness, but only before the Acting District Judge (Mr. Dias), who tried the first issue. Perera had not then been examined, and important documents produced by him were not then before the Court. But after their production neither party desired to examine Boteju upon them. No explanation, therefore, has been given by him of those documents. In particular, no explanation has been furnished of his remarkable letter to Perera of June 23, 1894, which runs

thus: "As I have spoken to you and expressed my views regarding the will, so go and speak to my brother-in-law to-day. In speaking to him you should encourage him to make the will as I suggested." Even the evidence given by Boteju on the trial of the first issue was apparently not read by the District Judge who tried the second and third issues. He, however, had Perera's evidence and the documents he produced. Boteju says that the testator dictated his instructions to him, and he conveyed them to Perera, and gave the draft and revised draft prepared by him to the testator, who approved them. For the reasons already stated, and based on the will alone, their Lordships cannot believe this statement. The letter above referred to, unexplained, strongly confirms the inference that Boteju got the will prepared without instructions and in complete ignorance that the testator had any landed property, and that the testator when he read and signed the will did not realize its effect. It is much to be regretted that Boteju was not examined and cross-examined on the trial of the second and third issues. On the question of undue influence he was the most important witness.

The case is not like *Rhodes* v. *Rhodes* (1) and others of that kind, where a testator has given instruction which he understood, and has left a solicitor to embody them in a will in proper form, and a blunder has been made which the testator did not discover and which the Court cannot correct. Their Lordships are satisfied that, although the testator may have given Boteju some instructions for a will, the testator never gave him instructions for any such will as he told Perera to prepare; and that the testator, although he may have read the will, was induced to sign it by undue influence of his wife and her relations, or some of them, and without appreciating its contents.

Their Lordships, having carefully reviewed the whole evidence, have come to the conclusion that the Supreme Court ought to have dismissed the widow's appeal, and to have affirmed the decision of the District Judge setting aside the will. The order varying it was unfortunate and encouraged the present

(1) 7 App. Cas. 192.

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appeal. If the respondents had not been content with the order as it stands, their Lordships would have felt bound to advise His Majesty to discharge the orders appealed from and to affirm the order of the District Judge; but as it is, they think they may properly, and they therefore will humbly, advise His Majesty to leave matters as they are, and simply dismiss the appeal. Their Lordships do not think that a new trial ought to be granted; but, owing to the unsatisfactory state in which the case stood when the appeal was brought, no order will be made as to the costs of the appeal.

Solicitor for appellant: *Chalton Hubbard.*
Solicitor for respondents: *Arthur Cayley.*

[PRIVY COUNCIL.]

J. C.* 1901 Dec. 18.

PEACH'S PATENT.
Ex parte PEACH AND BOSWELL, HATFIELD & CO., LIMITED.

Prolongation of Patent—Petition by Assignees—Accounts of Inventor's Profits.

Petition by assignees of a patent for its extension dismissed, no means of judging whether the inventor had been remunerated having been given. An application for adjournment was refused as unprecedented.

THIS was a petition to extend the term of letters patent, which had been granted to Charles Peach on January 30, 1888, No. 1382, for an invention of "improvements in the method of and in machinery or apparatus for grinding cutlery or other articles which require to have a convex surface." Boswell, Hatfield & Co., Limited, were assignees of the said letters.

It stated that the invention was at the date of the letters a new invention within the realm, and had been communicated from abroad to Peach from one Johnston, who had obtained letters patent in the United States of America; that foreign

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD LINDLEY, and SIR FORD NORTH.

patents were applied for and granted in respect of the said invention; that they had been allowed to lapse in the second or third year of their respective terms; and that no pecuniary or other remuneration had been received by the petitioners in respect thereof. There was no allegation that Johnston, who was admitted to have been the actual inventor, had been insufficiently remunerated, nor were there any accounts of Johnston's produced.

Moulton, K.C., and *Lever*, for the petitioners, contended that Peach was the legal inventor, for he had introduced the invention into England, had become the patentee in his own name, and had also been doing his best to introduce the trade.

Sutton (*The Attorney-General* with him), for the Crown, cited *Newton's Patents* (1); *In re Bower-Barff Patent* (2); *Semet and Solvay's Patent* (3); *Carl Pieper's Patent.* (4)

Moulton, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an application for an extension of a patent which was a communication from abroad. The applicants, who are a commercial company and the assignees of the patent, have given their Lordships no opportunity of judging whether the inventor has been remunerated in any shape or form. That, in their Lordships' opinion, is fatal to the petition.

Their Lordships have been asked to grant an adjournment, in order that the information which is now wanting may be supplied. They decline to do so. They do not find that there has been any case in which such an application has been granted by this Board. The rules which guide their Lordships in the exercise of their duty of advising the Crown whether a patent should be extended or not are perfectly well known, and they must be strictly followed. An application for an extension of a patent is an application for an indulgence, and for an indulgence of a very extraordinary kind. Patentees who

(1) (1884) 9 App. Cas. 592.
(2) [1895] A. C. 675.
(3) [1895] A. C. 78.
(4) (1895) 12 Rep. Pat. Cas. 292.

J. C. 1901 PEACH'S PATENT. PEACH AND BOSWELL, HATFIELD & Co., *Ex parte.*

come and ask for that indulgence must understand that the settled rules that guide this Board will be adhered to. Their Lordships will humbly advise His Majesty to refuse this petition.

Solicitor for petitioners: *C. A. Anderson.*
Solicitor for the Crown: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.* 1902 *April* 15; *May* 14.

COMMISSIONERS OF TAXATION . . APPELLANTS;

AND

TRUSTEES OF ST. MARK'S GLEBE . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Land and Income Tax Assessment Act of 1895, *s.* 11, *sub-s.* 5—*Glebe Lands let on Leases—User and Occupation—Exemption from Land Tax.*

Held, that under the New South Wales Land and Income Tax Assessment Act, 1895, s. 11, sub-s. 5, glebe lands by Crown grant vested in the respondents for parochial church purposes in connection with the Church of England, but let on building leases or sub-divided for that purpose, were not exempt from assessment for land tax as being lands occupied or used exclusively in connection with public charitable purposes or a church.

Although the rents and profits of those lands might be so used by the trustees, yet so far as the lands were let on building leases they were not so used by the lessees, and so far as they were not let they were not occupied or used for any purpose.

APPEAL from a judgment of the Supreme Court (Oct. 24, 1900) on a special case stated by the Court of Review under s. 45 of the Land and Income Tax Assessment Act of 1895 (59 Vict. No. 15), on appeal by the respondents against an assessment to land tax made by the appellants under the said Act.

That assessment was in respect of about forty acres of land

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

at Randwick vested in the respondents (as trustees appointed under an Act 8 Will. 4, No. 5, for the regulation of the affairs of the United Church of England and Ireland in New South Wales) by a Crown grant dated June 3, 1857.

The object of the grant as set forth therein was to promote religion and education in New South Wales, and the said lands became and were at the time of the assessment vested in the respondents upon trust for appropriation as the glebe annexed to the church of the United Church of England as by law established erected at Greenoaks, Darling Point, and known as St. Mark's, in conformity with the provisions of the aforesaid Act and of another Act—7 Will. 4, No. 3.

The whole of the glebe lands were sub-divided into allotments or blocks for sale or to let on building leases, and a portion of such allotments or blocks had been and was at the date of the assessment demised by the respondents on building leases, and the lessees had erected private dwellings on and were paying rent in respect of such demised premises to the respondents. Another portion of such allotments or blocks had been and was demised by the respondents on building leases, and the lessees thereof were paying rent in respect of the same, but had not built thereon and were not otherwise occupying the same. The rents had been and were being applied by the respondents for the purposes of the trust. The residue of the lands, i.e., the undisposed of allotments, were at the time of the assessment waste land not physically occupied or used for any purpose.

The following were the questions proposed in the special case:—

"1. Was I right in holding that only such lands as were directly or physically occupied or used for or in connection with a public charitable purpose were exempt from assessment under the said sub-section? or,

"2. Were the demise of the said lands and the receipt and application of the rents thereof by the appellants" (the present respondents), "as aforesaid, an occupation or exclusive user of the said lands, or any of them, for a public charitable purpose within the meaning of the said sub-section?

J. C. 1902 COMMISSIONERS OF TAXATION v. TRUSTEES OF ST. MARK'S GLEBE.

"3. Was the possession of the said waste lands as aforesaid an occupation or exclusive user of the said waste lands for or in connection with public charitable purposes within the meaning of the said sub-section?"

The Supreme Court answered these questions in favour of the respondents. All the judges thereof concurred in holding that the said glebe lands were exempt from assessment for land tax because they were used exclusively for or in connection with the church.

Asquith, K.C., and *Vaughan Hawkins*, for the appellants, contended that whether the glebe lands were let on building leases to private persons or were vacant lands laid out for the purpose of being so let, in either case they were not lands occupied or used exclusively for or in connection with a church or other object mentioned in s. 11 of the Act of 1895. Nor were they occupied or used exclusively for or in connection with a public charitable purpose or a church within the meaning of sub-s. 5 of s. 11. Nor were they used for public purposes within the meaning of sub-s. 6. The question must be decided in reference to the user, possession, or occupation of the lands, not in reference to the application of the rents issuing thereout. Reference was made to *Moran* v. *Commissioners of Taxation*. (1)

Cohen, K.C., and *Tyrrell Paine*, for the respondents, contended that according to the true construction of the Act it was a question of the application of rent rather than the user of land. The rents received were applied by the respondents to the purposes of the trusts contained in the Crown grant and to no other purposes. It was submitted that in order to exempt them from assessment under s. 11, sub-s. 5, it was not necessary that there should be either direct physical possession or direct physical user by the respondents. As to so much thereof as was let, the respondents as trustees occupied or used them exclusively for or in connection with public charitable purposes or a church within the meaning of that sub-section. It was let in order to improve its value in furtherance of the trusts on which it was held. Then, as

(1) 19 N. S. W. L. R. 189.

regards the lands which were not let, it was contended that the respondents, not having demised the same, did, under the Crown grant, occupy or use them within the meaning of the sub-section.

Asquith, K.C., replied.

May 14. The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from the decision of the Supreme Court of New South Wales, upon a special case stated by the Court of Review, under s. 45 of the Land and Income Tax Assessment Act of 1895. The question in substance raised by the special case was whether certain glebe lands, by Crown grant vested in the respondents for parochial church purposes in connection with the Church of England, were in the circumstances stated in the special case exempted from assessment for land tax. The Supreme Court decided that the glebe lands were exempted, and the Commissioners have appealed.

The decision of the question depends on the construction of s. 11, sub-s. 5, of the Land and Income Tax Assessment Act of 1895, which is as follows:—

"Part II.—Land Tax.

"Sect. 11. The lands and classes of lands hereinafter specified are exempted from assessment for taxation under this Act, namely:—

"(5.) Lands occupied or used exclusively for or in connection with public pounds, public hospitals, whether supported wholly or partly by grants from the Consolidation Revenue Fund or not, and which are not a source of profit or gain to the users or owners thereof, benevolent institutions, public charitable purposes, churches, chapels for public worship, universities, affiliated colleges, the Sydney Grammar School, mechanics' institutes and schools of arts, and lands on which are erected public markets, town halls, or municipal council chambers, or any lands the property of or vested in any council or municipality, public hospital, university, or affiliated college."

J. C. 1902 — COMMISSIONERS OF TAXATION v. TRUSTEES OF ST. MARK'S GLEBE.

Are the lands in question "occupied or used exclusively for or in connection" with public charitable purposes or a church?

The lands (in area about forty acres) were vested in trustees appointed under an Act of 8 Will. 4, No. 5, by Crown grant of June 3, 1857. The object of the grant was therein stated to be to promote religion and education in New South Wales, and the trusts were declared to be "for the appropriation thereof as the glebe annexed to the Church of England" at Greenoaks, Darling Point, and known as St. Marks, in conformity with the provisions of the said Act, and of another Act of 7 Will. 4, No. 3, so far as applicable.

By s. 21 of the Act 8 Will. 4, No. 5, trustees were empowered with certain consents to demise glebe lands for terms of years and apply the rents and profits (1.) in paying an annual sum of 150*l.* a year to the officiating minister of the church as an allowance for the glebe; (2.) in building or enlarging the church to which the glebe is annexed or a residence for the clergyman; (3.) in or towards building or enlarging a church in another place in the same township or district and paying a stipend to the officiating minister; (4.) with the consent of the bishop in or towards the building of other churches and residences for clergymen and endowing the officiating minister thereof.

Pursuant to this power the glebe lands of St. Mark's have been sub-divided into blocks for sale or to let on building leases. Some of the blocks have been demised by the respondents on building leases, and the lessees have erected private dwellings thereon. Others of the blocks have been demised on building leases, but have not yet been built on, and the balance of the lands are waste lands, and are not (to use the language of the special case) "physically occupied or used for any purpose."

On these facts the Supreme Court has held that the lands are "used in connection with" the charitable purposes of the Crown grant. It cannot be denied that the words in themselves and without a context are capable of that construction. But, reading the whole of s. 11, sub-s. 5, of the taxing Act, their Lordships think that the words point rather to the use and occupation of the land itself, and do not primâ facie apply to the use or purpose to which the rents and profits derived

from the land may be applied. A private dwelling-house is used and occupied by the owner or lessee of it as a residence for himself and his family, and it would, in the opinion of their Lordships, be a forced construction to say that it was used by the lessors for their own purposes because they apply the rent which they receive in a particular way. If it be said that the land is used by the trustees, though not by the lessees, for the charitable purpose, the answer would seem to be that the land is, strictly speaking, not used by the trustees at all. They have parted with the use and occupation of it during the term of the lease. It is the money derived from the rents and profits which they use and not the land. Looking at the context, it is to be observed that lands used "for or in connection with" public hospitals, universities, and affiliated colleges are in the first instance exempted, and later in the section, as a separate exemption, "lands the property of or vested in" any public hospital, university, or affiliated college are also exempted. According to any admissible use of language, the latter exemption must be intended to cover something not included in and different from that comprised in the first exemption. But there is no similar exemption of land the property of or vested in churches or charitable trustees generally. The words "for or in connection with" (say) a hospital or a church are probably intended to include, not only the actual site of the hospital or church, but also other buildings or land occupied in connection with the principal building, as, for example, land used for a residence for the head or minister, or a room for church meetings or other similar purposes.

In short, their Lordships, while admitting that the words are not free from ambiguity, think that they should be construed strictly. If it had been intended to include all lands which are vested in or held as an endowment only of churches, grammar schools, and the like, they cannot think that the Legislature would not have found apt words to express its meaning.

As to the lands which are not let, the special case finds that they are not occupied or used for any purpose. They are not,

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therefore, on the construction which their Lordships have given to the words of the section, within the exemption.

Their Lordships will, therefore, humbly advise His Majesty that the order of the Supreme Court should be reversed, and question 1 in the special case should be answered in the affirmative, and questions 2 and 3 in the negative, and that the present respondents should pay the costs of the hearing in the Supreme Court. The appellants will pay the costs of this appeal, regard being had to the terms on which special leave to appeal was given.

Solicitors for appellants: *Light & Galbraith.*
Solicitors for respondents: *Paines, Blyth & Huxtable.*

[PRIVY COUNCIL.]

J. C.* 1902 *April* 15; *June* 5.

COMMISSIONERS OF TAXATION . . APPELLANTS;

AND

ANTILL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Land and Income Assessment Act, 1895, *s.* 28, *sub-s.* 1—*Construction—Income Tax—Deduction of Fair Rent in respect of Crown Lease—Practice—Costs.*

Held, under New South Wales "Land and Income Tax Assessment Act of 1895," that the respondent, who carried on the business of a grazier on land held under a Crown lease (and therefore exempt from land tax), was not entitled to deduct from the taxable amount of his income in 1899 a sum representing the fair rental value of the leasehold premises and improvements thereon for that year. The deduction is not authorized by s. 28, sub-s. 1, the rental value not being an outgoing, loss, or expense within the meaning of that sub-section.

Decree of the Court below reversed, the appellant paying respondent's costs in accordance with the terms on which special leave to appeal had been granted.

APPEAL by special leave from a decision of the Supreme Court (Feb. 14, 1900) upon a special case stated by the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

Court of Review under s. 45 of the Land and Income Tax Assessment Act of 1895. The only question therein was whether a tenant of Crown lands who, for the purposes of his business as a grazier, has for a large sum of money purchased from prior lessees a Crown lease of his lands upon which improvements had been made and has made further improvements on them is, in order to ascertain the income in respect of which he is chargeable for tax, entitled to a deduction of the fair rental value of such lands and improvements over and above the rent payable under the Crown lease. The Supreme Court decided in favour of the respondent that he was entitled to make the deduction.

The material sections are given in their Lordships' judgment.

The respondent held "Mara" station from the Crown under a lease for a rent of twenty-eight years from August 5, 1889, at a term of 415*l.* per annum. The respondent bought this lease on May 5, 1890, from the prior lessees for the sum of 10,250*l.*

It was admitted for the purposes of argument on the principle involved in the decision of the present case, and subject to reconsideration of the facts if the respondent should be successful, that the improvements on "Mara" at the time of the purchase by the respondent were of the value of 3000*l.*, and that there has been spent since in improvements the sum of 1000*l.*; that the present value of the respondent's interest in the leasehold premises (apart from the improvements) is 13,850*l.*; that 542*l.* yearly is a fair rental value of the said lands apart from improvements over and above the rent payable to the Crown; and that 202*l.* is a fair rental value of the improvements.

The respondent, in making his income tax return under the Act for the year 1898, claimed a deduction of 641*l.* as "fair rent" in respect of the alleged rental value (belonging to him) of the station and improvements. This deduction the appellants refused to allow, and the respondent appealed from the disallowance to District Court Judge Docker, sitting as the Court of Review, who on October 3, 1899, dismissed the appeal.

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The Court of Review, holding that the respondent was not entitled to any deduction in respect of the rental value of the premises and improvements, stated the said special case for the decision of the Supreme Court.

Asquith, K.C., and *Vaughan Hawkins*, for the appellants, contended that the deduction claimed was not a loss, outgoing, or expense actually incurred by the respondent in the production of his income within the meaning of s. 28, sub-s. 1, of the Act of 1895. The leasehold "Mara" station consists of lands in respect of which land tax is not payable under the Act, and no such deduction as that claimed is authorized by s. 28, sub-s. 1, or otherwise. In truth, the sum sought to be deducted is income accruing to the appellants derived from lands of the Crown held under lease, and is expressly made payable by s. 15.

Cohen, K.C., and *Tyrrell Paine*, for the respondent, contended that the fair rental value of the lands leased and of the improvements thereon is an essential element to be taken into account in ascertaining the amount of taxable income derived from the respondent's business as a grazier. According to the Act and to the form of returns prescribed by the regulations made thereunder, the deduction claimed in this case is allowed. What has been deducted is the estimated rental value of improvements which contribute to income derived from the lease. That is an outgoing or expense actually incurred by the respondent in producing his income: see s. 28, sub-s. 1. It is and should be deemed to be money laid out for the purposes of the grazing business. Under s. 29, sub-s. 6, it ought to be deducted. It should be deemed to be the rent or value of premises occupied for the purposes of that business to be deducted under s. 29, sub-s. 7: see *Russell* v. *Town and County Bank*. (1)

Vaughan Hawkins, replied.

1902 *June 5.*

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This appeal raises a question under "The Land and Income Tax Assessment Act of 1895." The

(1) (1888) 13 App. Cas. 418.

appeal is against a judgment of the Supreme Court of New South Wales on a special case stated by the Court of Review under sect. 45. The Appellants are the Commissioners of Taxation.

It appears from the special case, which was founded on admissions made for the purpose of the appeal to the Supreme Court, that Mr. Antill, the present respondent, carried on business as a grazier on a station or run called "Mara," held under lease from the Crown. The special case set forth:—

(1.) The sum paid by Mr. Antill for the purchase of the station from the prior lessees;

(2.) The rent payable to the Crown;

(3.) The term unexpired;

(4.) The value of the improvements at the time of Mr. Antill's purchase;

(5.) The amount spent on improvements by Mr. Antill after the purchase;

(6.) The present value of Mr. Antill's interest;

(7.) The fair rental value of the premises apart from improvements over and above the rent payable to the Crown;

(8.) The present value of Mr. Antill's interest in the improvements; and

(9.) The fair rental value of such improvements.

The question on which the decision of the Supreme Court was pronounced was whether or not Mr. Antill was entitled to deduct or have deducted from the taxable amount of his income for the year 1899 "a sum representing the fair rental value of the said leasehold premises and improvements thereon for that year."

The Full Court, consisting of Darley C.J. and Owen and Simpson JJ., answered that question in the affirmative.

The Act of 1895 imposes both a land tax and an income tax. Under Parts II. and III. of the Act the land tax is to be assessed on the unimproved value of all lands with certain exceptions. It is common ground that the holding known as "Mara" station falls within the exception of "Crown lands," and is exempt from land tax.

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The provisions as to income tax are contained in Part IV. of the Act, beginning with s. 15.

By s. 15 it is declared that subject to the provisions of the Act income tax is to be levied in respect of the annual amount of all incomes exceeding 200*l.* per annum:—

"(i.) Arising or accruing to any person wheresoever residing from any profession, trade, employment, or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person.

* * * * * *

"(iii.) Derived from lands of the Crown held under lease or license issued by or on behalf of the Crown.

"(iv.) Arising or accruing to any person wheresoever residing from any kind of property, except from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

Under s. 17 certain incomes, including "income derived from the ownership of land subject to land tax" and "income derived directly from the use or cultivation of land subject to land tax, are exempt from income tax.

Sects. 27 and 28, so far as material for the present question, are as follows:—

"27. For the purpose of ascertaining the sum, hereinafter termed 'taxable amount,' on which (subject to the deductions hereinafter mentioned) income tax is payable, the following direction and provisions shall be observed and carried out:

"(i.) The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation.

* * * * * *

"(iii.) No tax shall be payable in respect of income earned outside the Colony of New South Wales.

* * * * * *

"(vi.) In all other cases the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources except to the extent of the exemptions provided by section 17.

"28. From the taxable amount so ascertained as aforesaid every taxpayer shall be entitled to deductions in respect of the annual amount of—

"(i.) Losses, outgoings, including interest and expenses actually incurred in New South Wales by the taxpayer in the production of his income."

It may be observed in passing that a taxpayer occupying for the purpose of business any land in respect of which land tax is payable by him is authorized by sub-s. (vi.) of s. 28 to "deduct a sum equal to 5 per cent. on the amount of the unimproved value of such lands plus 5 per cent. on the amount of the value of the improvements thereon which are used and required for the purposes of such business." No such deduction, however, is authorized in the case of a taxpayer who occupies for the purpose of business land not subject to land tax.

The result of these enactments seems to be that the only deductions which Mr. Antill was entitled to make from the income arising or accruing to him from "Mara" station were those specified in s. 28, sub-s. (i.). In the opinion of their Lordships, the deduction sanctioned by the Full Court under the head of "fair rental value of the leasehold premises and improvements thereon" is not an outgoing, loss, or expense within the meaning of that sub-section. The learned Chief Justice thought it fell "exactly within the word 'expenses.'" His view was that the word "income" as used in the Act of 1895 was equivalent to the expression "balance of gains and profits" in "the English Act." "The thing taxed," he said, "is the same in both Acts," and he relied on some well-known decisions in England in cases under Sched. D. His learned colleagues agreed with the Chief Justice. Owen J. was clearly of opinion that the principle in "the Act of 1895" and "the English Act" was "the same." "They both," he said, "impose a tax on net income and net income only." Simpson J. was of the same opinion, principally for the reason that the tax was an income tax. "Income," he said, "means profit." The terms were, he thought, "synonymous." Their Lordships may observe that the case of *Russell* v. *Town and County*

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Bank (1), on which Owen J. relied, has little or no bearing on the question. It merely decided that banking premises used by a bank for the purposes of its business were not used as a "dwelling-house" within the meaning of one of the rules under Sched. D, although an official of the bank was required to reside there.

Instead of collecting income tax by separate returns under different schedules of charge, as is the case under the income tax code in force in this country, the Act of 1895 in force in New South Wales first imposes a land tax upon all lands in the State with certain exceptions, and then requires inclusive returns of all income arising from any kind of property in the State except from land subject to land tax. The Act of 1895 differs so much, both in its general scheme and in its language, from the income tax code in force in the United Kingdom that it is difficult to see how decisions in cases under Sched. D, which imposes the tax on trade and professional incomes in this country, can be any guide to the construction of "The Land and Income Tax Assessment Act of 1895."

Their Lordships are of opinion that the decision of the Full Court cannot be supported, and they will therefore humbly advise His Majesty that the order of that Court should be varied by answering in the negative the question which has been answered in the affirmative.

Having regard to the terms on which leave to appeal was granted, and to the fact that the difficulty was in a great measure due to directions issued by the Commissioners of Taxation, their Lordships are of opinion that the costs of the respondent of this appeal, although it has been successful, ought to be paid by the appellants.

Solicitors for appellants: *Light & Galbraith.*
Solicitors for respondent: *Paines, Blyth & Huxtable.*

(1) 13 App. Cas. 418.

[PRIVY COUNCIL.]

TURNBULL & CO. . . . . DEFENDANTS;

AND

DUVAL . . . . . PLAINTIFF.

J. C.*
1902
March 11;
April 18.

ON APPEAL FROM THE SUPREME COURT AT JAMAICA.

Practice—New Trial refused—No Application for Discovery—Cancelment of Security by Married Woman for her Husband's Debts.

Held, that the appellants could not enforce a charge on the respondent's share in her father's estate, obtained through their agent, who was also executor and trustee for her under her father's will, by pressure through her husband, whose debts were to be thereby secured, concealment of material facts, and without independent advice:

Held, further, that the appellants, who before the trial had made no application for discovery of documents, were not entitled to a new trial on the ground of an important document, shewn to have been accessible at the trial if called for, having since come to their knowledge.

APPEAL from an order of the Supreme Court (Sept. 17, 1900) dismissing a motion by the appellants to set aside a judgment entered for the respondent by Clarke C.J., or to grant a new trial.

The action was brought, under the circumstances set out in their Lordships' judgment, to set aside an indenture of August 5, 1898, made between the respondent of the first part, her husband of the second part, and the appellants of the third part, and for payment by the appellants of the moneys which they had received thereunder with interest.

The judgment (May 17, 1900) was in favour of the respondent for 503*l.* 15*s.* 1*d.*, being the sum of 665*l.* which the appellants admitted they had received under the said deed less the sum of 161*l.* 4*s.* 11*d.*, the amount in which the respondent's husband was indebted to the appellants for beer, and for which the respondent admitted she was liable to the appellants, with interest from January 18, 1900, at the rate of 6 per cent.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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per annum. And it was decreed that the said deed be given up to be cancelled, and it was ordered that the appellants do pay the costs of the action.

Terrell, K.C., and *F. Safford*, for the appellants, contended that the order of September 17, 1900, should be reversed. The evidence proved that the deed was executed by the respondent with full knowledge of the contents and effect thereof, and of all the circumstances material to the transaction, and that the security was accepted by the appellants in good faith and for valuable consideration. The deed of August 18, 1898, had a material bearing as shewing that the respondent had been separately advised, and that her liability was secured by a charge on her husband's estate. It was not disclosed at the trial, and did not come to the knowledge of the appellants until it was registered, which was not till two days after the judgment; and therefore in any event there should be a new trial.

There was no confidential relation between the respondent and Campbell, and no evidence of undue influence. It is not a case of purchase by a trustee—see *Luff* v. *Lord* (1)—but of an executor taking a charge on a legatee's legacy. Campbell owed no duty to the legatee as to her way of dealing with her legacy, and was bound to pay it as she directed. Reference was made to *Naylor* v. *Wynch* (2) to the effect that it is not the rule of equity that every person to whom the artificial name of trustee applies is incapable of dealing with his cestui que trust; the essential thing is that the relationship gives the former some possible advantage over the latter: *Barron* v. *Willis* (3); see also *Smith* v. *Kay*. (4)

The respondent did not appear.

1902 *April* 18.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether a security for 1000*l.* given to the appellants by a married woman for debts of her husband is impeachable by

(1) (1864) 34 Beav. 220.
(2) (1824) 2 L. J. (Ch.) 132.
(3) [1900] 2 Ch. 121.
(4) (1859) 7 H. L. 750, 770.

her. The Supreme Court of Jamaica held that it was. The creditors to whom the security was given have appealed from their decision.

The respondent did not appear by counsel or otherwise on the hearing of the appeal, which their Lordships regret.

The facts are as follows :—

Mr. Duval, the husband of the respondent, was in business in Jamaica, and was in pecuniary difficulties and indebted to the appellants. They carried on business in Jamaica under the name of Turnbull & Co. They also carried on business in London under the name of Park, Macfadyen & Co., and in New York under the name of Park, Son & Co. Their agent in Jamaica was a Mr. Campbell. He was manager for Turnbull & Co., and was the agent in Jamaica of the other firms.

In August, 1898, when the security in question was given, Mr. Duval was indebted to all these firms. He owed the London firm only a small sum, about 22*l.*; but he owed the New York firm nearly 1500*l.*, and he owed the Jamaica firm nearly 1000*l.* This sum was mainly due for beer supplied by Campbell for Turnbull & Co. to Mr. Duval, to enable him to fulfil a contract which he had entered into for the supply of beer to the military forces in Jamaica.

Mr. Duval's indebtedness to the New York firm was for brick-making machinery, which he had obtained in order to start a brick factory. Throughout the summer of 1898 Campbell had been pressing Duval to reduce his indebtedness, and had threatened to stop supplying beer unless he did.

Mrs. Duval is, according to her own account, a good business woman. She was on good terms with her husband and trusted him ; but they were not living together in August, 1898.

Mr. Campbell was not a stranger to her. He was an executor and a trustee of her father's will, and presumably, therefore, a friend of her father. Her father died in January, 1898, and by his will, after making a devise and bequest to another daughter, the testator devised and bequeathed the residue of his estate to Mr. Campbell and another gentleman upon trust to sell and convert the same into money, and to

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hold the proceeds upon trust (inter alia) to invest a sum of 2000*l.* for the benefit of Mrs. Duval and her children. He gave very wide discretionary powers to his executors and trustees as to selling his property and winding up his affairs, and, subject to previous devises and bequests, he directed his trustees to pay and divide the ultimate residue of his estate amongst his three children and two nieces. Mrs. Duval, therefore, was entitled to one-fifth of her father's residuary estate, and Mr. Campbell was a trustee of that share for her.

In August, 1898, the accounts of her father's estate had not been settled. The amount of her share of the residue was not ascertained until a year afterwards, and was then found to be 665*l.*, after deducting legacy duty. Mr. Campbell, however, was the person whose duty it was to realize and ascertain and pay over her share to her. The appellant's contention that he stood in no fiduciary relation towards her is obviously untenable.

According to Campbell's evidence, Duval was the first to suggest a security on his wife's property; he said that his wife would consent to give it. Duval says Campbell first suggested that Mrs. Duval should be applied to for assistance. Be this as it may, it was ultimately arranged that Campbell should have a security prepared and that Duval should get his wife to sign it. Accordingly it was prepared by Campbell's solicitors from his instructions. Campbell gave it to Duval; Duval got his wife to sign it. Pietersz, who was Campbell's chief clerk, witnessed it and brought it back to Campbell signed. He went with Duval to get it signed, and he went at Campbell's request.

Mrs. Duval stated in her evidence that she never authorized her husband to offer her property as security; and she never had any communication with Campbell about the matter. She never requested any one not to take proceedings against her husband. Shortly before August 5, 1898, she and her husband talked about her giving security. She knew that he was in difficulties about the beer business, and believed that 1000*l.* would get him out of his troubles. She knew that he had a brick factory and machinery, but not that he was in difficulties

with reference to this. She knew nothing about any document she was to sign until it was brought to her by her husband. She had no advice about it; she did not read it; it was not explained to her. She signed it because her husband pressed her to do so, and told her he was being pressed by Campbell, and because she believed that if she would sign it for 1000*l.* it would enable her husband to settle the beer contract. She meant to lend him 1000*l.* to get him out of his trouble. It was witnessed by Pietersz. She says that he told her there was no harm in it; and that she attached importance to this statement as she knew he was Campbell's chief clerk, and she relied on Campbell for protection. Pietersz, however, denies that he said there was no harm in it, or anything to that effect.

Mrs. Duval's statements as to what she knew of her husband's affairs, of what he told her, and of the pressure under which she signed the security, are all corroborated by her husband.

The security signed is set out in the record. It is by no means a simple document. It is not a security for a present advance to her or to her husband. It states Duval's indebtedness to the three firms in divers large sums of money, and contains a statement that the partners had at Mrs. Duval's request agreed not to take proceedings against her husband until after September 30, 1898, and then it gives a charge on her share of her father's residuary estate in favour of the partners carrying on business under the three firm names above mentioned for all sums due or to become due from her husband to them in respect of any business transactions, and a covenant by her to pay what may be so due. But both the charge and the covenant are limited in amount to 1000*l.*

It is unnecessary to state at length the further dealings between the parties. Arrangements were made between Duval and Campbell for reducing the debt on the beer account, and it was considerably reduced. In August, 1899, Mrs. Duval received an account of what was due to her in respect of her father's estate. The amount was 700*l.* less duty, but she

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was told there was a charge upon it in favour of Messrs. Park, Macfadyen & Co., and that before any money could be paid to her she must arrange with them. This induced her to consult Mr. Gray, a solicitor, who obtained a copy of the security, and at once endeavoured to have it amicably set aside. In this he was not successful. In November, 1899, the trustees of the will paid Turnbull & Co. the sum of 665*l.*, being the plaintiff's share of her father's residuary estate. On December 19, 1899, her husband became bankrupt. On the 21st Mrs. Duval commenced the present action against Turnbull & Co. By her claim she impeached the validity of the security she had signed, and demanded payment to her of the sum of 665*l.* received by the defendants. A defence was put in. The plaintiff obtained the usual order for discovery from the defendants; but they did not apply for discovery by her. The trial came on in due course; witnesses were examined, documents were put in evidence; but a deed of August 18, 1898, hereafter referred to, was not produced or referred to. The action was tried by the Chief Justice without a jury, and he set aside the deed. The plaintiff, however, was willing to pay what was still due on the beer account, namely, 161*l.* odd, and she obtained judgment for the balance of the 665*l.* with interest and costs.

From this decision Turnbull & Co. appealed to the Supreme Court, and the appeal was dismissed with costs. The appeal now before their Lordships is from this decision of the Appeal Court, and from a refusal to direct a new trial.

The effect of the evidence given at the trial has been already stated. In the face of such evidence, their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could

not. But there is an additional and even stronger ground for impeaching it. It is, in their Lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Co. are unaffected by such pressure and ignorance. They left everything to Duval, and must abide the consequences.

Their Lordships do not think it necessary to refer to authorities to shew that such a transaction cannot stand. The well-known case of *Bridgman* v. *Green* (1) is conclusive to shew that Turnbull & Co. can obtain no benefit from it.

But then it is said that since the trial an important document has been discovered which entitles the appellants to a new trial. This is a deed dated August 18, 1898, and made between Duval of the one part and his wife of the other part. It recites Duval's indebtedness to Turnbull & Co. to the extent of 1600*l.*, and the security given by his wife as already mentioned. The deed then contains a covenant by Duval to indemnify her, and a conveyance and assignment of property for the same purpose. This deed ought, it is said, to have been registered; but it was not registered until May 19, 1900. In the meantime Duval had become bankrupt and obtained his discharge, and judgment had been given in favour of the wife in the present action. Its registration first brought it to the knowledge of the appellants.

As already stated, they made no application in the action for discovery of documents. It appears, however, that Mrs. Duval or her solicitors had this deed, or a copy of it, as it was in Court at the trial ready to be produced if wanted. From one point of view it corroborates Mrs. Duval's story, for it only refers to her husband's indebtedness to Turnbull & Co., and contains no allusion to the other firms, and Mrs. Duval only knew of the beer trouble. On the other hand, the deed states that Duval was indebted to them in 1600*l.*, a much larger sum than she said she had any idea of, and the appellants contend

(1) (1755) 2 Ves. Sen. 627.

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that this shews that she knew more about her husband's affairs than she admitted at the trial.

The Supreme Court refused a new trial, and their Lordships are of opinion that they were right in so doing. A new trial ought never to be lightly granted. No case of fraud or surprise is made out. Inability to obtain knowledge of the document before the trial is negatived by the fact that Mrs. Duval or her solicitor had it, or a copy of it, and no application for discovery was made by the appellants. Further, it is plain that Mrs. Duval had no idea of what she had been induced to sign before August, 1899, when she saw a copy of the security sent to her by her solicitor.

It is not suggested that she had any more advice when she signed the deed of August 18, 1898, than she had when she signed the security of the 13th. The deed of August 18 might perhaps have been useful to the appellants on the trial for her cross-examination. But this is all that can be said about it; and their Lordships concur with the Supreme Court in thinking that it ought not to alter the final result.

Their Lordships will humbly advise His Majesty to dismiss the appeal.

Solicitors for appellants: *Tippetts*.

[PRIVY COUNCIL.]

DOUGLAS . . . . . DEFENDANT;

AND

FRANZ SANDER & CO. . . . . PLAINTIFFS.

J. C.*
1902
April 17, 18;
May 14.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Actio Doli—Fraud.

Even assuming that an actio doli will only lie in Natal when no other action is open, in accordance with the texts of Roman law, it is nevertheless open to a plaintiff who by the fraud of which he complains has been deprived of his other remedies; and by Roman-Dutch law is not barred in two years.

APPEAL from a decree of the Supreme Court (Nov. 2, 1900) so far as it reversed a decree of the Circuit Court of the district of Durban (Aug. 6, 1900) and dismissed the appellant's claim in reconvention.

In reconvention the appellant claimed damages, and alternatively relief from the lease sued on, for that he had been induced to enter into the contract for the purchase of the respondents' business of carriers, including the horses and plant then used in such business, by the false and fraudulent representation of Franz Sander (then a partner in the respondents' firm) that no post-mortem had been held on any horse or horses of the respondents.

The Circuit Court found that Sander deliberately deceived the appellant, and gave him a decree for 600*l.* damages. It held that though the actio redhibitoria or actio quanti minoris was lost by lapse of time, an actio doli would lie.

The Supreme Court found that the appellant had not been induced by fraud to make his contract, and that therefore he could not succeed in an actio doli. It held that, not having complained after learning the true facts, he had lost his remedies by either of the other actions referred to, and therefore

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

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could not maintain the actio doli, which, according to the authority of Voet, does not lie where another remedy is open and has been lost by the plaintiff's own fault.

The material portion of the Supreme Court judgment is as follows:—

"As regards this action, which on account of fraud is given against the guilty party, and which is known in the Corpus Juris as actio doli mali, it must be observed that the dolus here relied on is that distinguished as 'intentional fraud,' and defined as 'craft, deceit, and trickery, resorted to for the purpose of entrapping, circumventing, and cheating another' (Dig. 4, 3, 12). But as Voet says (Voet, 4, 3, 13), 'the action does not lie if great and manifest deceit is not proved sufficiently clearly' (Dig. 4, 3, 7, 10), and it can only be rightly ascertained from the surrounding circumstances. We do not think that the circumstances in this case—the words or actions of Sander—amount to such a malus dolus as entitle the plaintiff in reconvention to succeed in an actio doli. Moreover, Voet says (Voet, 4, 3, 13 finis) the action will not lie if there had been some other action available, but which was lost through his own fault, as when he neglected to take proceedings within the time prescribed by law, which is just Douglas's case here as regards the actio redhibitoria and the actio quanti minoris. We are of opinion that the learned judge was right in holding that the actio doli, if available to Douglas after losing his right to the actio redhibitoria and the actio quanti minoris, would not be prescribed by the lapse of a short period. There is apparent conflict of the authorities on this point. The preponderance of authority seems to support the learned judge's ruling. The Code certainly lays down (C. 2, 21, 8) that the actio doli must be brought within two years from the day in which the dolus was committed, and Voet says (Voet, 44, 3, 6 in med.) the actio doli must be brought within two years. He qualifies this, however, by saying (Voet, 4, 3, 12), 'yet that the action in factum for the amount to which the defendant has been made the richer by his fraud is given for the full period of thirty years (in perpetuum) is beyond all doubt because illicit gains are to be wrested away.' And again

(Voet, 4, 3, 24), 'since by our law nowadays the action for fraud does not cause legal infamy, the commentators lay down that it can be resorted to during the full period of thirty years.' It is clear that when Voet speaks of the limit of two years he is referring to the Code. According to Groenewegen, the actio doli is by the law of Holland available for thirty years at suit of the party defrauded. Grotius, however, says (Maasdorp, 2nd ed. p. 686) that in Holland a claim based on fraud is prescribed in two years; Van Leeuwen, vol. i. bk. 2, ch. 8, s. 6, says that the prescription of two years obtains; but he is here citing from the Code. Kotze (in his translation of Van Leeuwen, R.-D. L., vol. ii. p. 13) has a foot-note, in which he says: 'The safest course is to draw a distinction on the point, 1st, whether the party desires on the ground of fear or fraud the rescission of the entire, otherwise maintainable, transaction; 2nd, whether he wishes to obtain that which by reason of the fraud is simply deficient (actione ad interesse).' In the first case we may safely adhere to the prescription of two years as having in this instance also been adopted; but in the second case, to depart therefrom for the action cannot be considered poenalis, but rei persecutoria, and therefore in factum."

Hume Williams, K.C., and *Arnold Statham*, for the appellant, contended that on the evidence the judgment of the Circuit Court was right, that the appellant was induced by the fraud of the respondent Sander to make his contract, and had thereby suffered the damages claimed. It was contended that the actio doli lay, for the appellant did not discover the fraud till more than twelve months after date, and therefore had not lost by his own fault either of the other two actions which had been open to him, namely, the actio redhibitoria, which was barred in six months, and the actio quanti minoris, which was barred in twelve months. Even if he had, an actio doli would still lie in Natal.

Loehnis, for the respondents, after contending on the evidence that fraud by the respondent Sander was not established, inasmuch as it was not shewn that the appellant, who possessed independent knowledge, relied upon his statement,

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submitted that the actio doli would, on the reasons given by the Supreme Court, not lie in this case. Dolus malus was not made out; the appellant had lost his other remedies by his own fault; no ground was shewn for resorting to a remedy which the authorities cited by the Supreme Court shewed was of a special character. He cited Digest IV., Tit. III., De dolo malo, ss. 1, 7; Voet, 6th ed. 1734, Commentarius ad Pand. vol. i. pp. 249 et seq., p. 253, s. 13; Digest XXI. Tit. I. ss. 19, 26.

Hume Williams, K.C., replied.

1902 *May* 14.

The judgment of their Lordships was delivered by

LORD ROBERTSON. On May 4, 1897, the respondents, who were carriers at Durban, in the Colony of Natal, sold to the appellant the whole of their business and plant for 4400*l.* The appellant took possession, and carried on the business in the premises which had been occupied by the respondents for that purpose. Those premises were held by the respondents under a lease from one Acutt, and it had been contemplated that the appellant should take over the lease. Owing to the disputes out of which the appeal has arisen, this was never done; and Acutt compelled payment from the respondents of the rent due for the period of the appellant's occupancy. On April 2, 1900, the respondents sued the appellant to recover the sum thus paid by them; and in answer to this suit the appellant made, in reconvention, a claim for 750*l.* as damages. The present appeal relates solely to this claim in reconvention; and no question is raised as to the merits of the principal suit. On August 3, 1900, the judge of the Durban Circuit Court gave judgment in the appellant's favour for 600*l.* On November 2, 1900, the Supreme Court of the Colony reversed this judgment and disallowed the claim. The present appeal is to have the Circuit Court's judgment restored.

The appellant's demand is clearly set out in his claim in reconvention, and is expressly made for damages for fraud. The fraud alleged consisted in a false statement by Franz Sander, one of the partners of the respondents' firm, which statement induced the appellant to enter into the contract of

sale of May 4, 1897, whereby he suffered damage. The statement made by Sander was that no post-mortem examination had been held of any horse belonging to the respondents, whereas the fact was that such a post-mortem examination had, to the knowledge of Sander, been held, and had proved the horses of the respondents' establishment to be infected with glanders at the time of the negotiations for the sale. This disease, having by that time got hold of the stables, again broke out in the time of the appellant's occupancy, and caused a loss in horses amounting to the sum of damages claimed.

The answer made by the respondents to this claim was that at the time of the sale of the business and plant the appellant was well aware that sickness had occurred among the horses, that several animals had been shot, and that a "post-mortem" had been held which clearly "established the existence of the disease called glanders."

On all the questions raised by the pleadings the evidence was highly conflicting; but at their Lordships' bar the conflict was greatly narrowed by the admission of the respondents that Sander did make to the appellant the false statement that no post-mortem examination had been held, although he had in fact been present at a post-mortem examination, and knew that it revealed glanders. The sole question, therefore, came to be whether in fact the appellant knew before the bargain that there had been glanders in the stable in 1897. If he did, then plainly the false statement did not induce the contract.

The following facts and dates are necessary for the due understanding of the controversy. The appellant had for some time prior to the bargain in question acted as manager for Benningfield & Co., who were carriers at Durban, and had besides business concerns at Johannesburg. The respondents' firm consisted of Franz Sander, whose fraud is the central fact in the case, and R. H. Tatham. These two persons had carried on the business in question from July 1, 1896, to April 30, 1897; and their predecessor in the same business had been one Mitchell. In 1895, in the time of Mitchell, and again in June, 1896, in the time of the respondents, there had been glanders in the stables, although the degree of virulence

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of the disease and the amount of publicity of its occurrence at the time must not be assumed to have been very great. In March and April, 1897, there occurred an outbreak, the seriousness of which was put beyond all doubt before the sale now in question by a post-mortem examination, the denial of which is the basis of the appellant's claim.

The case of the appellant on the question whether he knew of the outbreak of 1897 is that, while he had heard rumours that there had been cases of glanders in the stable in 1896, he did not know at all (and still less for certain) of an outbreak in 1897, and that he accepted as true the following statement which Tatham, one of the respondents, when examined in this case, admitted that he made to the appellant while the proposal for sale was on foot: "I told him that glanders had been said to have existed in Mitchell's time, and that there was a difference of opinion between the laymen and the professionals then, but that in any case the loss of five or six horses a year, which was all I had experienced, merely meant 100*l.* or so." This statement seems to their Lordships to be of capital importance. In the first place, it was quite untrue. At the time it was made Tatham knew that the Government inspector had been down and had condemned the stable a few days before, the presence of glanders having been demonstrated by a post-mortem examination of a horse selected and killed as a specimen. All these things were in the immediate and personal knowledge and recollection of Tatham. His fraud, of which there can be no doubt, is not directly in issue, but on the issue immediately under consideration, namely, the knowledge possessed by the appellant, it is extremely difficult for the respondents to maintain that the appellant did not believe the statements of Tatham. It has, however, been maintained with some plausibility that the rumours which had reached the appellant as to glanders in 1896 must have put him on his guard, and that it is difficult to suppose that a fact so interesting to one in his trade as the outbreak of 1897 had not reached him. There are, however, several answers to this contention, the main and primary one being that the judge who heard the witnesses believed the appellant in his assertion that

he did not know of the outbreak in 1897. The appellant's testimony, moreover, is supported by various considerations, the first of which is to be found in the interesting evidence given by the Government veterinary surgeon as to the nature of the disease in question. It appears that in South Africa glanders often occurs with symptoms much less pronounced than in England, and that it runs (as he expresses it) a much more chronic course than in England, so that men really acquainted with horses would not think anything the matter, except in advanced cases. There would, he says, be nothing extraordinary in the appellant not detecting glanders from inspection; even a professional man could not detect it without the mallein test, unless the horse shewed potent symptoms. And he goes on to say that a horse might last a good many years with glanders.

This evidence is important in itself, as preparing one the more readily to accept the appellant's testimony, and it also shews how the question about the post-mortem examination assumed the crucial importance assigned to it by the appellant, as determining his decision whether to buy or not. Their Lordships consider the evidence to justify the conclusion of the judge who heard the witnesses, and they hold that the appellant had no independent knowledge preventing his accepting the statement made by Tatham, his vendor, according to Tatham's own testimony. This conclusion is supported by the admission of Sander that the price paid was a high price, and one which he for his part would not have given if he had known there were glanders in the stable. On a specific point made by the respondents about a notice of the outbreak appearing in a local newspaper, their Lordships have no reason to reject the explanation given by the appellant and accepted by the Circuit Court that he was at Johannesburg at the time and did not see it. The incredulity expressed by the Supreme Court does not rest on any positive basis and has no affirmative evidence to support it, having regard to the desperate position of both Tatham and Sander as witnesses of credit.

The respondents, however, have maintained an argument against the present claim which is independent of testimony.

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They say that the appellant has lost his remedy, and that the present claim is untenable in Roman-Dutch law. Shortly stated, the argument is as follows: In Roman law a person induced by fraud to enter a contract may elect to set aside the contract by the actio redhibitoria, in which case he must sue within six months; or he may sue an action quanti minoris to recover the difference between what he ought to have had and what he has had, in which case he must sue within twelve months. The appellant, say the respondents, was in this case; according to his own shewing, he might have had either action, and he has sued neither. What he has done is to sue an actio doli (or action of deceit); but this remedy is only given to those to whom no other action was ever available; and that, as already pointed out, is not the case of the appellant.

Now, assuming that the question is to be determined exactly as if it had occurred in Rome and before the praetor, one important qualification must be made of the doctrine thus stated. In the chapter in the Digest, De dolo malo, it is indeed laid down that if another action had been open to the plaintiff the actio doli must be refused. But the text goes on to give the reason—sibi imputet that he has not a remedy—"qui agere supersedit," and then it is added, "nisi in amittenda actione dolum malum passus est." It thus appears that, if the same fraud which has induced the contract also operates to deprive the plaintiff of his other remedies, the praetor will give the actio doli. This is the same thing as saying that, if the plaintiff only discovers the fraud more than a year after the bargain, the actio doli is open to him. Now, their Lordships are satisfied that this is the case of the appellant. He says, and their Lordships believe, that he only learned in August, 1898, of the post-mortem examination and of the fact of glanders, and that was more than a year after the date of the sale. The actio doli would thus be open to the appellant even on pure Roman law as administered by the praetor. To the objection that the actio doli was itself limited to two years, the Supreme Court give the answer that in Roman-Dutch law the Roman rule has been departed from in favour of the general prescription of thirty years; and their Lordships

see no reason to question this conclusion. On these grounds the action is defensible, and the decree given by the Circuit Court was right.

Their Lordships think it right, however, to add that they do not desire to assert as on their own authority that an action of deceit in Natal will only lie under the conditions stated in the texts of the Roman law. The argument at their Lordships' bar on this matter was, to say the least, not copious; and no reference was made to authorities more modern than Van Leeuwen. On such an argument they would be reluctant to stereotype according to ancient procedure what is a matter of practice affecting mercantile transactions, the more especially as the reluctance of the praetor to grant the actio doli was expressly rested on the ground that it was actio famosa, involving infamy to the person against whom fraud was proved. This consequence would not follow a successful action of deceit in Natal; and it is impossible to avoid asking whether this chapter of the Roman texts is part of the living Roman-Dutch law, and whether the action of deceit is hampered for those obsolete reasons, the more especially seeing that in the comparatively modern work of Van Linden an action of damages is spoken of as the normal remedy for fraud inducing a contract. In the meantime it is not necessary to enter on these questions, for the present case admits of decision on grounds consistent with the archaic procedure invoked.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court ought to be reversed with costs, and the judgment of the Circuit Court of Durban restored. The respondents will pay the costs of the appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

J. C.* 1902 *April* 16, 17; *May* 14.

SPURRIER AND ANOTHER . . . . . DEFENDANTS;

AND

G. F. LA CLOCHE . . . . . PLAINTIFF.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Construction of Contract—Conflict of Laws—Intention of Parties as to Law applicable—Fire Policy—Award Condition precedent to Suit.

Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation and effect are to be governed.

Hamlyn & Co. v. *Talisker Distillery*, [1894] A. C. 202, followed.

Where a fire policy made in Jersey is nevertheless an English contract, no action can be brought upon it until the amount has been settled by arbitration according to the condition contained therein.

Scott v. *Avery*, (1855) 5 H. L. C. 811, followed.

APPEAL from two judgments of the Superior Number of the Royal Court (Dec. 3 and 4, 1900) affirming two interlocutory judgments of the Inferior Number (Nov. 6 and 16, 1899), and the final judgment of the Inferior Number (Nov. 6, 1900).

On September 30, 1899, the respondent, under the circumstances stated in their Lordships' judgment, sued the appellants, as agents in Jersey of the Sun Fire Office, to recover 1000*l.* insured by a fire policy dated January 4, 1897, effected by the respondent on his collection of foreign stamps.

The appellants pleaded that the policy was made subject to a condition No. 12, whereby it was expressly agreed and declared to be a condition precedent to the liability of the company for any claim under the policy that the claim should, if not admitted, be referred to arbitration as therein provided, and that the claimant should have no right of action against the company except for the amount of the claim, if admitted, or the amount, if any, awarded by the award of the arbitrator,

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

arbitrators, or umpire, and that the respondent had appointed one arbitrator and the company another, and that the arbitrators had not agreed upon an umpire, and that the condition had not been fulfilled; and the appellants prayed that the action might be dismissed.

The respondent replied that the condition was contrary to the law of Jersey, and of no force or effect. It appeared that the respondent had appointed a resident of Jersey an arbitrator, and the appellants had appointed a resident of London the other arbitrator, and that the arbitrators had not been able to agree upon an umpire. Judgment was given for the respondent, no reasons being stated.

Cohen, K.C., and *Wood Hill*, for the appellants, contended that, having regard to the 12th condition of the policy, there was no right of action upon it unless and until the liability of the insurers in respect of the respondent's claim thereunder had been referred to and determined by arbitration in the manner prescribed by the 12th condition. Compliance with it had not been prevented by the company, and it was for the respondent to take all necessary measures to insure the making of an award as a condition precedent to his right of action. The appellants could not have applied to the High Court in London to appoint an umpire under the Arbitration Act, 1889, the respondent not being amenable to its jurisdiction. Reference was made to *Caledonian Insurance Co.* v. *Gilmour* (1) as to a reference to unnamed arbitrators being a condition precedent to a right of action; *Hamlyn & Co.* v. *Talisker Distillery* (2) as to the law in reference to which the parties contracted being determined by their intention as expressed in or implied from the terms of the contract: see *Scott* v. *Liverpool Corporation* (3) and *Mackay* v. *Dick*. (4)

R. Storry Deans, for the respondent, contended that the contract contained in the policy sued upon was made in Jersey, and was intended to be and ought to be construed and enforced according to the law of Jersey. By that law the condition

(1) [1893] A. C. 85, 89.
(2) [1894] A. C. 202.
(3) (1858) 3 De G. & J. 334, 360.
(4) (1881) 6 App. Cas. 251, 263.

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contained in clause 12 is illegal, if and so far as it excludes the jurisdiction of the Courts of the island over the contract. The action was not brought against the Sun Fire Office, but to enforce the personal liability of its agents under a contract made in Jersey. Reference was made to *Scott* v. *Avery* (1); *Elliott* v. *Royal Exchange Assurance Co.* (2); *Trainor* v. *Phœnix Fire Assurance Co.* (3) Even if compliance with the condition was necessary to complete the respondent's right to sue, he had done all in his power to fulfil it; while the appellants had unreasonably refused to appoint another arbitrator in the place of their original nominee. The latter had acted unreasonably in insisting on the appointment of an umpire not amenable to the jurisdiction of the Jersey Courts. The Jersey Court had done right in removing him, for unreasonable conduct in an arbitrator is misconduct under the statute: see *East and West India Dock Co.* v. *Kirk.* (4)

Counsel for the appellants were not heard in reply.

1902 *May* 14.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the Royal Court of Jersey has given due effect to an arbitration clause contained in a policy of assurance against loss by fire.

The policy in question is dated January 4, 1897. It is a fire policy for 1000*l.* issued by the Sun Fire Office in favour of a Jersey gentleman named La Cloche on a collection of foreign stamps. The policy is in the English language, but it was executed in Jersey by the agents of the company. By the terms of the policy the company agrees with the assured, subject to the conditions indorsed, to pay what may become due in case of loss out of its capital stock and funds. The witnessing part runs thus: "In witness whereof I, for and on behalf of the said company, have hereunto set my hand and seal this 4th day of January, 1897. Signed Spurrier and Le Cronier, agent to the Sun Fire Office. Signed and sealed at

(1) (1853) 8 Ex. 487; 5 H. L. C. 811.
(2) (1867) L. R. 2 Ex. 237.
(3) (1892) 65 L. T. 825.
(4) (1887) 12 App. Cas. 738.

Jersey, where no stamps are in use, in the presence of Spurrier, Jersey," and then there was a seal.

The conditions indorsed are fourteen in number. They are in the English language. The 12th condition, which is the only material one, is as follows:—

"12. If any difference shall at any time arise between the company or the insured, or any claimant under this policy, as to the liability, or the amount or extent of the liability, of the company in respect of any claim for loss or damage by fire, or as to any question, matter, or thing concerning or arising out of any claim for loss or damage under this policy, every such difference, as and when the same arises, shall be referred to the arbitration of some person to be appointed in writing by both parties, or two indifferent persons, one to be appointed in writing by the party claiming and the other by the company, within one calendar month after either party has been required so to do by the other party, and in case of disagreement between the arbitrators, then to the decision of an umpire, who shall have been appointed in writing by the arbitrators before entering on the reference, and who shall sit with the arbitrators and preside at their meetings during the reference, unless the arbitrators shall otherwise agree in writing; and the death of any of the parties shall not revoke or affect the authority or powers of any arbitrator or umpire; and each party shall bear or pay his own costs of the reference and a moiety of the costs of the award; and in all other respects the submission to arbitrators shall be subject to the provisions of the Arbitration Act, 1889, or any statutory modification thereof, and may be made a rule of Her Majesty's High Court of Justice in any Division, upon the application of either of the parties. And it is hereby expressly declared to be a condition precedent to the liability of the company in respect of any claim under this policy that the claim shall, if not admitted, be referred to and determined by such arbitrator, arbitrators, or umpire as aforesaid, and the claimant shall have no right of action against the company except for the amount of the claim, if admitted, or the amount, if any, awarded by the award of such arbitrator, arbitrators, or umpire."

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The first question which arises is whether this is to be regarded as an English contract or as a Jersey contract. Their Lordships are of opinion that, although this policy was made in Jersey, and any money payable under it would have to be paid to the assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all shew that the contract between the parties is an English contract, and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shews that the arbitration proceedings were to be conducted according to English law and no other. That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy: see *Hamlyn & Co.* v. *Talisker Distillery* (1), and the intention here is unmistakable.

It does not follow that the agents who signed the policy in Jersey were not liable to be sued in Jersey upon it, as their principals were in this country. But whatever would be a defence by the law of England for the company on the merits to an action against the company on the policy would be a defence for the agents, if sued in Jersey for the non-payment of money payable under the policy by the company.

It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: see *Scott* v. *Avery* (2) and *Caledonian Insurance Co.* v. *Gilmour*. (3) The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract.

Mr. Deans contended that the arbitration clause was invalid

(1) [1894] A. C. 202. (2) 5 H. L. C. 811.
(3) [1893] A. C. 85.

by the law of Jersey, because not only the amount payable but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the Court, and went further than *Scott* v. *Avery*. (1) But if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of any Court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incompetence of a particular Court to enforce it, that the Court of Exchequer went wrong in *Scott* v. *Avery*. (1) The oversight was pointed out and corrected in the Exchequer Chamber (2), and again in the House of Lords. Maule J. put the matter in the true light in the Exchequer Chamber; he there said: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency; but they cannot legally agree that when it is payable no action shall be maintained for it." (3)

Mr. Deans cited no authority to shew that by the law of Jersey such a condition as that which has to be considered in this case is invalid, and could be rejected even in a contract governed by the law of Jersey. Judging from the decision printed in the record, it would seem that the law as laid down in *Scott* v. *Avery* (1) prevails in Jersey. But in those cases the question of liability was not left to the arbitrator. However, even if the law of Jersey had been shewn to be what Mr. Deans contended it was, the answer to his argument would still be that this policy is governed by the law of this country and not by the law of Jersey; and that the distinction he drew between arbitrations in which liability is left to arbitrators, and those in which the amount payable only is so left, is immaterial where an award settling the amount is a condition precedent to the right to payment of anything.

The foregoing observations really dispose of this appeal. What happened was as follows: In December, 1898, a fire

(1) 5 H. L. C. 811. (2) 8 Ex. 487.
(3) 8 Ex. 499.

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occurred in the house of the assured, and his collection of stamps was damaged or destroyed. He gave notice of his loss, and claimed 1000*l*. He appointed a Jersey gentleman (Guiton) his arbitrator. The Sun Fire Office appointed an English gentleman (Thwaites) their arbitrator. The arbitrators could not agree upon an umpire. Thwaites wanted an English barrister; Guiton wanted some gentleman resident in Jersey, which would save expense. Neither can be blamed for not giving way to the other. No application was made under the English Arbitration Acts to the Courts of this country to appoint an umpire. The company could not proceed adversely to the assured, who was beyond the jurisdiction of the English Courts, and the assured preferred to apply to the Court in Jersey. Failure to agree upon an umpire brought the arbitration proceedings to a deadlock.

On September 30, 1899, the assured brought an action in the Royal Court in Jersey on the policy against the agents who signed it, and he claimed 1000*l*. The defendants relied on the 12th condition, and the absence of any award as a defence to the action. On October 9, 1899, the Royal Court ordered that the arbitrators should be summoned to appear. On November 6 they did appear. Thwaites appeared by counsel and objected to the jurisdiction of the Court over him. The Court then ordered the defendants to appoint another arbitrator in his place. The defendants declined to do this, and the arbitrators were then dismissed from the action, which was remitted to the Greffier to assess the amount payable to the plaintiff. On November 6, 1900, the plaintiff recovered judgment for 1000*l*., and on December 4, 1900, the Appeal Court confirmed the preceding orders and judgment. The appeal is from this judgment of the Appeal Court, and from the orders and judgment thereby confirmed.

On the merits of the case their Lordships do not think it necessary to add to what has already been said. No reasons are given for the judgment appealed from, and their Lordships cannot make any observations upon them. The judgment appears to them erroneous in principle.

The order of November 6, 1899, requiring the defendants to

appoint another arbitrator in the place of Mr. Thwaites, appears to their Lordships to be erroneous for two reasons, namely, (1.) because Mr. Thwaites had done nothing to justify his removal, and (2.) because if he had the Court in Jersey was not the proper tribunal to remove him. The English Arbitration Act conferred no such power on any foreign Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, and that the judgment of the Royal Court of Jersey of December 4, 1900, and the orders and judgment thereby affirmed, ought to be reversed, and that judgment ought to be given for the defendants with costs.

The respondent having obtained leave to defend this appeal in formâ pauperis, no order can be made as to the costs of the appeal.

Solicitors for appellants: *Dawes & Son.*
Solicitors for respondent: *Hargreaves & Joblin.*

[PRIVY COUNCIL.]

J. C.* 1902 June 5, 18.

HORNE AND ANOTHER . . . . . DEFENDANTS;

AND

STRUBEN AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Construction—Title—Terms of Grant—Diagram.

In a grant of land with certain specified boundaries "as will further appear by the diagram framed by the surveyor":—

Held, that, as a matter of construction, where the diagram is repugnant to the terms of the grant, the latter will prevail.

Although by arts. 8 and 13 of the Proclamation of August 6, 1813, there must be a diagram before a title be granted, yet the right of the grantee must be expressed in his title, and, when so expressed, will not be limited by the diagram.

APPEAL from a decree of the Supreme Court (June 7, 1900).

The respondents, as registered owners in undivided shares of a certain farm known as "Kagelbaai," sued the appellant Horne, the Surveyor-General of the Colony, and the Hon. A. J. Herholt, in his capacity as Secretary of Agriculture in the Colonial Government, to obtain an amended title of the said farm, based on a survey and a diagram made by a surveyor named Charles Marais, and a declaration of the rights of the plaintiffs in respect of the boundaries of the said farm, and of the water of the Steenbrazem River, alleged to form the northern boundary thereof.

The Supreme Court gave judgment as prayed.

Warmington, K.C., and *Mackarness*, for the appellants, contended that the amended title-deed granted by the judgment constituted a grant of land at variance with the grant made by the original deed on May 15, 1843, with diagram attached

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

thereto. They contended that the western boundary of the grant was a line shewn on the original diagram about 200 feet above and inland of the high-water mark on the seashore. The diagram was made by an experienced surveyor and ought to be adhered to. To adopt the respondents' contention that the boundary was the high-water mark itself involved an encroachment on Crown lands never contemplated by the parties to the grant. The farm was what was originally known at the Cape as a "loan place," and granted upon quit-rent tenure in terms provided for in the Proclamation of Governor Sir John Cradock issued on August 6, 1813. Under that Proclamation the boundaries of the "loan place" were ascertained by a surveyor appointed by the grantee with the approval of the government, and the diagram so framed by the surveyor defined the quit-rent grant then made of what had hitherto been held on "loan" tenure. (See the recital to Proclamation and ss. 1, 5, and 13.) The boundaries must, by the terms of the grant, be ascertained by reference to this diagram by which the respondents' predecessors in title were bound, and could not be altered so as to correspond with a new diagram attached to the respondents' declaration. Reference was made to *Reid* v. *Surveyor-General*. (1)

Haldane, K.C., and *Boydell Houghton*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD ROBERTSON. This is an appeal against a judgment of the Supreme Court of the Cape of Good Hope declaring the boundary of the respondents' farm; and the controversy relates to two parts only of the boundary declared. The lands adjoining the farm in question are Crown lands, and the appellants represent the Crown.

The respondents purchased the farm in 1899, and they are now, in right of the original grant, on perpetual quit-rent, which was made in 1843. Prior to 1843 the farm had been held on loan lease; and the grant on quit-rent was made under the system established by the Proclamation of August 6, 1813,

(1) (1897) 14 Buchanan's Sup. Ct. Rep. 34.

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entitled "Conversion of Loan Places to Perpetual Quit-rent." The description of the farm in the grant is as follows: "A piece of land containing 2520 morgen, situated in the division of Stellenbosch Field Cornetcy of Hottentots Holland, being the loan place 'Kogel Baay' or 'Langgezocht,' extending west to the seashore, south, south-east, and east to the mountains, and north to the Steenbrazem River, as will further appear by the diagram framed by the surveyor."

On acquiring the farm the respondents had it surveyed by one Charles Marais, and made application to the appellant, the Surveyor-General, for an amended title and diagram in accordance with the diagram which embodied Mr. Marais's survey. This application was made under the Act No. 9 of 1879, and the competency and appropriateness of this application and of the subsequent judicial procedure are unquestioned. The Surveyor-General objected to Mr. Marais's line at certain points, but those objections ultimately resolved themselves into two. The matter came into Court by summons on April 28, 1900, the respondents claiming an order declaring the boundary in accordance with the line marked on the plan annexed to their declaration, and an order for an amended title shewing the boundary accordingly. The defendants appeared, and in their plea stated their points of challenge; issue was joined and evidence led, with the result that the Court, by the judgment appealed against, decided both the controverted points in the respondents' favour, and (with an omission which does not touch that controversy) granted judgment in the terms of the prayer.

Before stating the two points of controversy between the parties, it is convenient to mention one matter which bears equally upon both and tells in favour of the respondents. The farm, according to the title, contains 2520 morgen. If the boundary line proposed by the respondents be accepted, so far from exceeding this amount they will have considerably less. On the other hand, if the appellants' theory be adopted in whole, the farm will be less by about 10 per cent. than it is stated to be in the title, the two disputed points contributing nearly equally to this further deficiency.

1. The farm in dispute, according to the title above set forth, is situated between the seashore and the mountains, those forming respectively its western and eastern boundaries, while its northern boundary is the Steenbrazem River.

Now the first of the two disputed points is the whole of the western boundary; and the respondents' line is drawn at high-water mark, or rather, as it sometimes is on the top of rocks, never nearer the sea than high-water mark. There is, therefore, no claim to foreshore, and, primâ facie, the respondents' claim would seem to be in exact accordance with the words of the grant "extending west to the seashore."

On the other hand, the contention of the appellants is much less simple. It was thus stated in their plea: "The defendants deny that the western boundary of the said farm extends to high-water mark. They contend that the true boundary is as shewn on the diagram referred to in paragraph 2 hereof" (i.e., the diagram referred to in the title of 1843 sought to be amended), "a distance of 200 feet inland from such high-water mark." And the Assistant Surveyor-General, in his evidence, thus stated the view of the Crown: "The words 'to the seashore' do not mean the seashore, but ought to be 200 feet."

It is difficult to comprehend on what theory this contention for 200 feet was rested or how the figure was reached, for the statute under which the Crown is now disabled from making grants within 200 feet of the sea was not passed until long after 1843. Again, while it is true that on the diagram of 1843 a line is drawn some distance within high-water mark, which seems intended to delimit the farm and to separate it from the seashore, the distance is not uniform, but quite irregular; and at their Lordships' bar the theory of 200 feet was abandoned in favour of an absolute adherence to the line laid down in the diagram of 1843. The appellants' contention, therefore, rests solely on the diagram, and the question is thus raised what is the degree of authority of that diagram in relation to the text of the grant in which it is mentioned. This discussion necessarily and very directly affects the other disputed piece of boundary, but it may conveniently be taken primarily in regard to that now under review, namely, the seashore.

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Their Lordships consider that assuming, as appears to be the case in regard to the western boundary, that the diagram contradicts the unambiguous text of the title, it must give way to the text. The words in the grant which introduce the diagram are, "as will further appear by the diagram framed by the surveyor." Now, as matter of construction, this is merely an appeal to the diagram for further elucidation of the text, and not a subordination of the text to the diagram. If in a matter not requiring elucidation the diagram is repugnant to the text, this merely shews (what in the present instance is abundantly proved by other circumstances) that the diagram is not exact, and affords only a rough delineation of the farm. Of the circumstances referred to, what is perhaps the most palpable and the most relevant to the present dispute may be mentioned. The northern boundary is said in the title to be the Steenbrazem River, a perfectly unmistakable boundary; but the diagram, ignoring the somewhat tortuous course of the river, makes the northern boundary a straight line inland from a rock on the seashore considerably to the south of the mouth of the river, which, as well as the rock, is depicted on the diagram.

In face of facts like these, it would be impossible to override the clear verbal description of the western boundary as the seashore merely out of respect to a diagram which, as regards the northern boundary, fails to depict the equally certain expression of the title, namely, the river, an arbitrary line being in each case substituted. But from the evidence, and also from the opinion of the Chief Justice, it appears that these old plans are "usually inaccurate, and afford only an approximate idea of the land to be conveyed."

It was argued, however, on the part of the appellants that the Proclamation only authorizes grants of the land which had been previously held on loan, and that to diagrams there was assigned by the Proclamation a higher importance than belongs to a plan referred to in a title, for they were made the basis of all quit-rent grants. Those two points are separate, and may easily be disposed of. First, it is quite true that the grant on quit-rent must not exceed in extent the loan place; but as in

the present case there is no evidence (apart from the grant of 1843 and the diagram) of the actual possession under the loan lease, the diagram must stand or fall on its merits where it differs from the words of the title. Second, if the Proclamation be examined, it will be found to give no support to the theory that it subordinates the words of the grant to the diagram, or gives to the diagram any exceptional authority. It is true that, under arts. 8 and 13 of the Proclamation, before a title can be granted there must be a diagram, in order that the Government may be fully certified before granting the title as to the land proposed to be granted complying with the requirements of the Proclamation. But, this condition having been fulfilled, the right of the grantee is to be expressed in his title, and it does not appear from the Proclamation that the title need even refer to the diagram or have it attached. In short, the Proclamation gives to the diagram no independent authority as limiting the terms of the grant.

Their Lordships are clearly of opinion that the objection of the Crown on the western boundary entirely fails.

2. The other question is about the north-eastern boundary, and involves a triangular piece of ground inclosed on plan A by the letters Y, B, C. The true question, however, is simply whether the northern boundary of the farm ends at B, as the Court has held, or at Y, as the appellants contend.

Here the case for the Crown rests solely upon the diagram being exactly and minutely accurate on a point on which it makes hardly a pretence of accuracy, and is demonstrably inaccurate. As has already been seen, the northern boundary, as laid down on the diagram, is a straight line drawn with complete disregard to the course of the river. Now the point Y, which is said to be the eastern end of that line, is reached simply by measuring on the ground the length of this arbitrary line, and stopping where it stops. This is frankly explained in evidence by the surveyor employed by the appellants to survey the farm. It so happened that this measurement landed them at a place about which it is almost incredible that it should be the salient point of a boundary, for it is almost inaccessible and invisible from the surrounding country. But further, owing to

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the nature of the gorge through which the Steenbrazem River runs, it would result from the adoption of Y as the eastern point at which the respondents' farm abuts on the river that they would have for practical purposes no access to the river. The appellants have, therefore, neither authority nor probability to support their contention. On the other hand, the point B has at least three substantial recommendations. Physically its situation stands out as a suitable boundary. It has in fact been the site of a beacon erected in 1863 by a former proprietor to mark the boundary and observed as doing so; and this, although not giving any prescriptive right, is yet evidence, so far as it goes, of boundary. The probability of this being the true boundary is increased by the fact that it admits of the farm being profitably occupied so far as access to water is concerned.

In these circumstances, their Lordships consider that the appeal entirely fails on this point also. They are fully satisfied with the judgment of the learned judges of the Supreme Court, and will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Wilson, Bristows & Carpmael.*
Solicitor for respondents: *Arthur Fell.*

[HOUSE OF LORDS.]

REEVE . . . . . APPELLANT.

AND

LISLE AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)
1902
July 24.

Mortgage—Clog on Redemption—Agreement subsequent to Mortgage—Option to purchase Mortgaged Property—Conditional Sale.

A mortgagor and mortgagee may, by a separate and independent transaction subsequent to the mortgage, make a valid agreement which gives the mortgagee the option of purchasing the mortgaged property, and thus may have the effect of depriving the mortgagor of his right to redeem.

The decision of the Court of Appeal, [1902] 1 Ch. 53, affirmed.

THIS appeal turned upon a question of fact whether a mortgage and an agreement were two separate transactions or one. The documents are fully set out in the report of the Court below. For the present purpose a summary will suffice.

By an agreement of April 23, 1896, between the respondents and the appellant, it was agreed that the respondents should lend the appellant 3000*l.*, and such further sums as the appellant should within two years require not exceeding 2000*l.*, the loan to be secured by the mortgage of a steamship; the respondents (if the interest was regularly paid) not to call in the principal, and the appellant not to compel the respondents to receive it, before the expiration of two years from the date of the mortgage; that if the respondents should elect within two years from the date of the agreement to enter into partnership with the appellant in his business, they should be at liberty to do so on the terms (inter alia) that the respondents should relieve the appellant from payment of the loan and transfer the ship free from the mortgage for the purposes of the partnership. On July 4, 1896, the mortgage was executed.

The 5000*l.* having been lent and not repaid, and the two years from the date of the agreement having elapsed, by a deed of June 27, 1898, the appellant assigned to the respondents

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property in Norfolk as security for 2000*l.*, part of the 5000*l.*, with a proviso for redemption on December 27, 1898, and covenanted to repay the 2000*l.* with interest on that date.

By an agreement of July 9, 1898, between the appellant and respondents, after reciting (inter alia) that the term of two years had expired on April 23, 1898 (1), and that the appellant was not in a position to comply with the respondents' application for the repayment of the 5000*l.* with interest, and had requested the respondents to extend the time of two years for a further period of five years, which they agreed to do upon certain terms, it was agreed (inter alia) that if at any time within the period of five years the respondents should elect to enter into partnership with the appellant in his business, they should be at liberty to do so upon the terms (inter alia) that the respondents should relieve the appellant from the payment of the 5000*l.*, and should transfer the ship free from the mortgage for the purposes of the partnership. Within the five years, namely, in February, 1900, the respondents gave the appellant notice that they elected to enter into partnership with him. The appellant having refused to comply, the respondents brought this action against him for specific performance or (alternatively) for breach of the agreement. Buckley J. held that the mortgage of June 27 and the agreement of July 9, 1898, formed really one transaction, but that the agreement was valid as a conditional sale, and that the rule against clogging an equity of redemption had no application; and he made an order (inter alia) declaring that the respondents were entitled to enter into partnership; that the refusal of the appellant was a breach of the agreement; for an inquiry as to damages; for payment of the loan and interest to the respondents; for a reconveyance by the respondents of the mortgaged properties to the appellant. The Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) held as a matter of fact that the mortgage of June 27 and the agreement of July 9, 1898, were separate and independent transactions, and on that ground affirmed the decision of

(1) This would seem to be a mistake for July 4, 1898, two years from the date of the mortgage.

Buckley J., but said they must not be understood as assenting to his view of the law. (1) In this House their Lordships gave no opinion upon the last point.

Warmington, K.C., and *Martelli*, for the appellant, contended that all the documents must be read together; that the mortgage and agreement of 1898 were in reality one and the same transaction; that the agreement was therefore invalid as a clog upon the equity of redemption; and cited *Noakes* v. *Rice* (2) and the cases referred to in the Court below.

Astbury, K.C., and *R. J. Parker*, for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, notwithstanding the gallant effort that has been made by Mr. Warmington and his learned junior in this case, it appears to me that it does come back to that which the Court of Appeal suggested, and, without quarrelling with or attempting to throw any doubt upon the propositions of law which have been advanced in this case, it seems to me that the Court of Appeal has taken the right view upon the facts. When I say upon the facts, I am speaking now of the facts as elicited by the documents themselves, though in respect of one of them it is perfectly clear, by the limited admission that is now made, that there was a mistake in reference to the question of the policy. Then the question which your Lordships have to determine is whether or not this second transaction of 1898 was or was not the same transaction in the sense in which those words are used by the learned counsel for the appellant.

The view of the Court of Appeal, who had all the facts before them (and I do not propose to question the view which they have taken of these documents read together), is this, that the later transaction was entirely separate—that it was, in truth, a matter applicable to the contemplated partnership, and that the real position of the parties was this, that all the securities were already in their possession; that this further transaction altered the rate of interest, but that the real

(1) [1902] A. C. 24. (2) Ante, pp. 24, 29.

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substance of the second transaction was the contemplated partnership. Under these circumstances it was a mere question of what inferences ought properly to be drawn from the nature of the instruments, and the object and purpose with which they were entered into, as well as what the documents contained in themselves. I come to the conclusion that what has been called here, and I think accurately called, the question of fact between the parties, was rightly arrived at by the Court of Appeal; and, if that is so, there is not and cannot be any question as to the law which ought to prevail in this case.

Under these circumstances I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion, and I take the same view of the facts that the Court of Appeal did. Notwithstanding the very able and ingenious argument addressed to us by Mr. Warmington to prove that the purpose of this document was consolidation and rearrangement of the mortgages, in my opinion it was nothing of the kind. The respondents had the benefit of all these securities. There was merely a stipulation introduced at the request of the appellant, who was asking for time. Not being prepared to pay the money, he said, "If you will give me five years, you shall have the whole of that time in which to determine whether to enter into the partnership or not." When the respondents did make up their minds to enter into the partnership, the appellant turned round and said, "Oh, but this transaction is entirely wrong; it strikes at the root of an equitable doctrine, and I am not bound by it." I think on the facts as we have them before us he is bound by it, and must pay damages for having broken his agreement.

LORD BRAMPTON. My Lords, I am of the same opinion.

LORD LINDLEY. My Lords, I also am of the same opinion. Mr. Warmington's argument is necessarily based upon the blunder in the recital in the deed of July, 1898, which is all

wrong. In point of fact, the real transaction was not taking a mortgage security for 5000*l.* or getting a better security than they had. It was not that at all. The real transaction was that the mortgagees were bargaining for a share in the partnership on certain terms. By a blunder in the recital they have given a foundation for a very ingenious argument, to which I am happy to say we are not bound to accede. I have no doubt the decision is perfectly right, and the appeal ought to be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 24, 1902.

Solicitors: *Cattarns & Co.; Rowcliffes, Rawle & Co., for Alfred Appleby, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

NEALE . . . . . APPELLANT;

AND

GORDON LENNOX . . . . . RESPONDENT.

Practice—Counsel's Authority—Compromise of Action—Agreement to Refer—Authority exceeded by Counsel—Limitation of Counsel's Authority unknown to other side.

A counsel has no authority to refer an action against the wishes of his client or upon terms different from those which his client has authorized. If he does so refer it the reference may be set aside although the limit put by the client on his counsel's authority is not made known to the other side when the reference is agreed upon. The Court before whom the question of setting aside the reference comes is not bound to sanction an arrangement made by counsel which is not in the opinion of the Court a proper one.

The plaintiff in an action for defamation of character authorized her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in Court. Her counsel, who did not make this limitation of his authority known to the defendant's counsel,

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agreed with the latter to refer the action without any disclaimer of imputations :—

Held, that the counsel having exceeded his authority the plaintiff was entitled to have the agreement to refer set aside and the cause restored to the list for trial.

The decision of the Court of Appeal, [1902] 1 K. B. 838, reversed.

THE appellant brought an action for slander and libel against her aunt, the respondent (who was the widow of Lord Henry Gordon Lennox), alleging that the defendant had made serious imputations against the plaintiff's character. The defendant denied speaking or writing the words complained of and that they bore the meaning imputed to them. On February 12, 1902, when the case was coming on for trial before Lord Alverstone C.J. and a special jury the judge suggested a reference. The following terms, written out by Sir Edward Clarke, the plaintiff's leading counsel, were handed to the plaintiff :—

"Defendant stating by her counsel that she never imputed or meant to impute anything against the moral character of the plaintiff, and is satisfied that there is no ground for any such imputation.

"Case referred to . . . . to say what should be done between the parties in satisfaction of all matters in difference between them.

"Case referred to . . . . to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action."

At the bottom of these terms the plaintiff wrote the words—

"I consent to either alternative Sir E. Clarke adopts.

"Dora Beatrice Neale."

This limitation of Sir E. Clarke's authority was not made known to the defendant's counsel. The defendant refusing to disclaim all imputations, Sir E. Clarke and the defendant's leading counsel, Isaacs, K.C., had an interview with Lord Alverstone, after which both the learned counsel returned into Court, and Sir E. Clarke said, the plaintiff being present, that

a juror would be withdrawn and the action referred. There was no disclaimer of the imputations. An order was afterwards drawn up in the following terms: "It is ordered that the whole of this cause be tried before H. F. Dickens, Esq., K.C., as official (1) referee, who shall have all powers of certifying and amending of a judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order 36." Before the order was drawn up the plaintiff took steps to set it aside, and on March 1 Sir E. Clarke moved before Lord Alverstone C.J. to restore the cause to the list for trial on the ground that the order of February 12 was made without the authority or consent of the plaintiff and contrary to her express instructions. On the hearing of this motion an affidavit by the plaintiff was read stating (inter alia): "On the case being called on I was asked to consent to the action being referred to an arbitrator for trial, and although I felt strongly disinclined to such a mode of trial of this action I (after consultation with my counsel) consented upon the express condition and understanding that the defendant admitted in Court by her counsel that my character was exonerated and no imputation was to rest upon it." The counsel referred to in this affidavit was understood by Lord Alverstone and the Court of Appeal to be the plaintiff's junior counsel, and there was no evidence that the plaintiff gave any verbal instructions to Sir E. Clarke upon the subject of a reference. Lord Alverstone held that the order to refer being an interlocutory order might be set aside, and therefore made an order on March 4 that the order of February 12 "be set aside, and the action be restored to the list: the plaintiff to pay the costs of and occasioned by the postponement and of this application in any event." The Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) made an order setting aside so much of Lord Alverstone's order of March 4 as restored the cause to the list, and ordering the action to be referred to Dickens K.C., failing whom to Boydell Houghton, as special referee. (2)

(1) *Sic.*

(2) [1902] 1 K. B. 838.

H. L. (E.) 1902

NEALE v. GORDON LENNOX.

The present appeal by the plaintiff was argued on July 29, 31, and August 1 by

Sir Robert Reid, K.C., and *R. J. Drake*, for the appellant, and *Isaacs, K.C.*, and *Norman Craig*, for the respondent.

The cases cited in the Court below were discussed; also *Richardson* v. *Peto*. (1)

EARL OF HALSBURY L.C. My Lords, I am of opinion that the judgment of the Court of Appeal ought to be reversed. I do not propose to go through the different cases which have been cited before your Lordships, because I think there is a higher and much more important principle at stake than that which is involved in discussing whether a particular part of a bargain has or has not been within the exact authority given to the learned counsel.

The undisputed facts in this case are these. The learned counsel who was employed for the plaintiff was desirous, for reasons which I appreciate and which I entirely share, to spare his client the necessity of wading by a public trial through such a cause of action as is involved in the trial of this cause. I myself was desirous of giving the parties an opportunity, even at this late hour, of preventing that which would, I should think, be injurious and certainly exceedingly painful to them both. But when the parties have resolved that their rights are to be determined by a regular tribunal, and that they will not agree to those courses which others may think more advantageous for them and more pleasant for them, the Court has no authority to insist upon their abstaining from the exercise of their legal rights; they must be permitted to conduct their litigation as they will.

Sir Edward Clarke, being moved by the desire I have alluded to, obtained in writing from his client a distinct consent upon certain terms to refer this cause. The terms are important to be looked at with reference to an observation that I will make

(1) (1840) 1 M. & G. 896.

presently. The terms are these—that the defendant, who was sued upon an allegation of having spoken certain grave and slanderous words of the plaintiff, should publicly at the time of the reference of the cause state by her counsel that no imputation had been made, that no imputation was intended to be made, and that the defendant was satisfied that there was no ground for any moral imputation upon the plaintiff's character. Can anybody doubt that that condition was one of supreme importance to the party who insisted upon it? It seems to me that a great many people would share the view of the plaintiff—I do not care whether they would be right or wrong in that view—but they would say, "If I am to go before a tribunal which has not," as Sir Robert Reid said, "the weight and authority of a public trial, I must have it perfectly understood, before I go before that private tribunal, that every imputation of any sort or kind upon my private character is withdrawn." The learned counsel who has last addressed us suggests that that does not involve the negative: I entirely disagree with him; I think the insisting upon that as a preliminary to entering into a reference at all does involve in the most emphatic form the negative—"Unless that is done I absolutely decline to have it tried otherwise than by a public tribunal." And, my Lords, that authority is in writing. We are not dealing here with an uncertain recollection of conversations. That is a written authority given, and, nevertheless, the cause is sought to be referred by the agreement of counsel without any such public statement, although the Court has before it the fact that that was the authority given, and that that preliminary statement about the plaintiff's character is an essential condition of the bargain by which the cause was referred.

My Lords, as I said, I will not go through the cases, because to my mind there is a higher and much more important principle involved. The Court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the Court is asked for its assistance when this order is asked to be made

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and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to.

My Lords, it appears to me that that is decisive of this case. A great many cases have been quoted, but it seems to me that of every one of those cases it would be true to say that no Court has suggested that the Court had not the power to do such a thing. It has been said, "If you allow this, everybody would be making similar applications." That is policy. It has been said in such and such a case the parties were present in Court and did not immediately repudiate the transaction, and therefore we are not satisfied that they did not consent. Those are all examples of what, in the exercise of its discretion, a Court might or might not do because it was or was not satisfied that the circumstances of the case did not justify the undoing of a bargain which had been made. And I can well adopt, and feel that I could safely affirm, every one of the decisions referred to. But when I come to this case and consider the question of what should be the position of the other party who has acted

upon the apparent authority of counsel, there are cases in which the Court undoubtedly, in the exercise of its discretion (and that is the observation which I intended to make), might well say, "If it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs." That is one example. Or the position of the other party might have been totally altered; for instance, I could imagine the case to be so delayed that it made the Statute of Limitations to run so that there was no possibility of trying the action again; and other cases might be put which would raise the question of the other party being put into such a position by the unauthorized act of counsel that one might well say, "This is a case in which one of two innocent parties must suffer; then the person by the act of whose counsel (the counsel whom he is responsible for employing) the difficulty has been created must suffer: the position of the parties has been totally altered by what has taken place, and therefore we cannot interfere." That would be because, upon its general jurisdiction of doing justice between the parties, the Court would think that it was not a case in which it ought to interfere. Those were the words which were uttered by Lord Lyndhurst in one of the cases which have been quoted.

But, my Lords, turning to the present case, I can hardly conceive a case in which there is a more prominent and more important principle involved than a case in which a person is coming to vindicate her character in public. What is the argument on the other side? What injustice is done to the other side by the action being tried now instead of its being tried then? Nobody can suggest any. It is said, "Your counsel made a bargain, and we will not let you off the bargain which he made." It seems to me that it is unarguable to say, if it is a matter of discretion at all, that that is a matter that would prevent the Court exercising its discretion. The effort to put this right by an application made to the Court was attended with certain costs. The Lord Chief Justice has with great propriety, I think, said that the party by the act of whose counsel the difficulty has arisen must pay the costs of that proceeding; but now that that is out of the way, what injustice

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or what impropriety is there on the one hand in the cause being restored to the list and being tried in due course? I can see none.

On the other hand, to tell me that the person whose character is alleged to have been attacked—I am not saying whether it is true or not—is to be deprived by this unauthorized act of the opportunity of vindicating her character in public, seems so gross an injustice that, upon the general jurisdiction that every Court has over its own procedure, this Court ought to refuse to allow that injustice to be committed. I therefore move your Lordships that this appeal be allowed, and that the order of the Court of Appeal be reversed.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I agree entirely in the two propositions which Sir Robert Reid laid down in his reply. I do not think that the Court is entirely in the hands of counsel, and bound to give the seal of its authority to any arrangement that counsel may make when the arrangement itself is not in its opinion a proper one. In the next place, I do not think that any counsel has authority to compel his client to refer an action which the client desires to try in open Court.

LORD BRAMPTON. My Lords, I am also of opinion that this decision ought to be reversed, and that the parties ought to be remitted to try the case in the ordinary course. I have rarely heard anything more preposterous, to my mind, than the notion that a suitor can impose no effective veto upon a course proposed to be taken by his or her own counsel which rightly or wrongly in his or her judgment will operate most prejudicially to his or her interests in an action, and possibly to the ruin of his or her character. I quite agree, therefore, that this appeal ought to be allowed and the case restored to the paper.

LORD LINDLEY. My Lords, I am of the same opinion. It appears to me that the Court of Appeal inadvertently, or for some reason which I do not understand, omitted to take into

account the duty and function of a Court in a matter of this kind. The judgment of the Court of Appeal proceeds upon the ordinary doctrines of agency; but the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind. The real facts are extremely simple. The Court which originally made the order made an order referring an action of libel and slander to a gentleman for trial. It made that order by the consent of the parties—it had no jurisdiction and no right to make that order except on the footing that the parties consented. The order is good on the face of it, and the learned judge who made it was perfectly justified in making it, having regard to the evidence before him. But before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instructions. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned judge who made that order to stay the drawing of it up if he had been informed that the Court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order. Unfortunately the plaintiff here wishing to get rid of the order drew it up with the view of getting it set aside, and in form this is an application, not to prevent the drawing up of the order, but to have it set aside; but that is mere form—mere machinery. It would be absolutely wrong, to my mind, for the Court to allow that order to be acted on and to take effect the moment it is judicially ascertained and brought to its attention that it is an order which the Court never would have dreamt of making if the Court had known the facts. That view of the case seems to me to have been overlooked by the Court of Appeal, and to be fatal to the validity of the order. The order made by the Lord Chief Justice was, as I understand it, that the order should be set aside and the action set down for trial, the costs of the application to set it aside being the defendant's in any

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event; and that, to my mind, ought to stand. The appeal ought to be allowed with costs—that is to say, the decision appealed from ought to be reversed with costs.

Order of the Court of Appeal reversed with costs here and in the Court of Appeal.

Lords' Journals, August 1, 1902.

Solicitors: *W. H. Jamieson; Lewis & Lewis*

[HOUSE OF LORDS.]

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HILDER AND OTHERS . . . . . APPELLANTS;

AND

DEXTER . . . . . RESPONDENT.

Company—Issue of Shares—Payment of Commission in Consideration of Subscribing for Shares—Option of Subscribers to take further Shares—Companies Act, 1900 (*c.* 48), *s.* 8, *sub-s.* 2.

To raise working capital a company offered shares at par to the appellant and some other persons with an option to take further shares at par within a certain time. The appellant subscribed for shares, and, the market price having risen to a premium, desired to take up the further shares:—

Held, reversing the decision of the Court of Appeal, that this was not an application of shares or capital money directly or indirectly in payment of commission, discount, or allowance within the meaning of the Companies Act, 1900, s. 8, sub-s. 2, and (the transaction being otherwise unobjectionable) that the appellant was entitled to exercise the option.

Burrows v. *Matabele Gold Reefs and Estates Co., Ld.*, [1901] 2 Ch. 23, in effect overruled.

THE following statement of facts is taken in substance from the judgments of Lord Davey and Lord Brampton.

The United Gold Coast Mining Properties, Limited, was incorporated on December 17, 1900, with a capital of 200,000*l.*, divided into 200,000 shares of 1*l.* each. In January, 1901, the directors determined to issue 33,333 shares, or one-sixth of their nominal capital. They did so by offering the shares, not

to the public, but to fourteen persons, of whom the appellant Hilder was one, and who were invited to apply for the shares. Hilder applied for and was alloted 6975 shares upon the following terms :—

"For each share allotted in accordance with this application a subscriber shall have the option during the period of one year from the 3rd day of January, 1901, of taking up at par a further ordinary share of 1*l.* in the initial capital of the company, and in the event of such last-mentioned share being taken up under such option, a further option during the period of two years from and after the said 3rd day of January, 1901, of taking up at par a further ordinary share of 1*l.* in the initial capital of the company."

For these shares Hilder paid 6975*l.* The rest of the 33,333 shares were allotted upon the same terms to the other thirteen applicants. In July, 1901, the 1*l.* shares were selling at about 2*l.* 17*s.* 6*d.*, and Hilder gave the company notice that he elected to take up further shares under his agreement with the company. The respondent, a shareholder, having brought an action against Hilder, the company, and the directors, Byrne J., holding the case governed by *Burrows* v. *Matabele Gold Reefs and Estates Co., Ld.* (1), granted an injunction restraining the company and directors from carrying out the agreement. This decision was affirmed by the Court of Appeal (Rigby, Collins, and Romer L.JJ.) on the same ground.

May 5, 6. *Haldane, K.C.* (*A. R. Kirby* with him), for the appellant Hilder; and *W. F. Hamilton, K.C.* (*K. G. Metcalfe* with him), for the other appellants. It is not disputed that the transaction would have been permissible before the Act of 1900, if not forbidden by the memorandum or articles. The payment of commission or brokerage for placing shares was approved in *Metropolitan Coal Consumers' Association* v. *Scrimgeour.* (2) In the present case the Court of Appeal followed *Burrows* v. *Matabele Gold Reefs and Estates Co., Ld.* (1) In that case, in consideration of an option to take shares at a price below the then market value, exercisable

(1) [1901] 2 Ch. 23. (2) [1895] 2 Q. B. 604.

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within a prescribed period, certain persons underwrote or guaranteed the subscription for a large number of shares. This was held to be an application of shares in payment of a commission, and forbidden by s. 8, sub-s. 2 (1), of the Companies Act, 1900. That, however, is not the effect of the legislation, and the above decision should be overruled. The words mean that the company is not to make a present of fully or partly paid-up shares to underwriters or subscribers. There is no prohibition in the Act against the granting of an advantage; the Act is intended to prevent the waste of a company's capital in commissions. The thing forbidden is the application by the company of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing for shares. The option, both in *Burrows' Case* (2) and in the present case, being to take shares at not less than par, there is no discount or allowance. Nor is there any application of shares in payment of commission; there is no payment by the company; the company only parts with its shares in return for the par value at the least. The commission comes out of the premium, if there is one—out of profits, not out of capital. If the shares do not realize a premium, the subscriber gets no commission. So long as the full face value of the shares is paid the Act is not infringed: the intention being to prevent the issue of shares as fully paid when they were not.

Levett, K.C., and *Clauson*, for the respondent. This is merely a device for paying commission out of capital. Sub-s. 1 of s. 8 is an enabling clause. Subject to the conditions therein specified, the company may pay a commission for the subscription or placing of shares, the conditions being that the payment of the commission paid and the amount or rate of the commission are authorized by the articles of association and disclosed in the prospectus, so as to be known to all persons interested. Sub-s. 2 is prohibitive. The company is not to "apply" shares or capital money in the way prohibited. In Murray's Dictionary to "apply" means, among other things,

(1) Sub-s. 2 is set out in Lord Davey's judgment. (2) [1901] 2 Ch. 23.

to put to a special use or purpose, to devote or appropriate to. "Shares" are distinct from "capital money": "or" is disjunctive, not explanatory. There is nothing to restrict the word "shares" to fully or partly paid-up shares. Here the applicant for every share has an option to take a second share. Each of these second shares must be appropriated or kept in reserve to make the option possible. The optional shares are appropriated, i.e. "applicable," to paying commission. The option may well be worth something: say 5*s*. The result will then be that the option-holder will get his 1*l*. share for 15*s*. This is a speculation by the company in its own shares; the value of the option will necessarily fluctuate with the market, and a great danger in underwriting and promotion be caused. The reasoning of Stirling L.J. in *Burrows' Case* (1) is conclusive.

Haldane, K.C., in reply.

The House took time for consideration.

Aug. 5. EARL OF HALSBURY L.C. My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. For that reason I abstain from giving any judgment in this case myself; but at the same time I desire to say, having read the judgments proposed to be delivered by my noble and learned friends, that I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the Legislature. I was largely

(1) [1901] 2 Ch. 23.

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responsible for the language in which the enactment is conveyed, and for that reason, and for that reason only, I have not written a judgment myself, but I heartily concur in the judgment which my noble and learned friends have arrived at.

LORD DAVEY (after stating the facts given above and the mode of issuing the 33,333 shares). My Lords, there is nothing whatever in the case to throw doubt upon the good faith of the directors in selecting this mode of issuing the shares of the company, in preference to offering them for public subscription in the ordinary way, or to impeach their exercise of the discretion vested in them by the articles. It appears from the affidavits that the scheme was to raise the necessary working capital by the issue of one-half of the share capital for cash, the other half being used for the purpose of payment in shares credited as fully paid up for the concessions to be purchased by the company. But it was said that this mode of raising the sum required for working capital is prohibited by s. 8, sub-s. 2, of the recent Act of 1900, and is therefore beyond the power of the company. This is the only question which has been argued at the bar.

Now, before construing the words of the section which is relied on, your Lordships are entitled to consider the state of the law before the section was passed, with a view to ascertaining the mischief to which the enactment is directed. It was decided by this House in *Ooregum* v. *Roper* (1) that a stipulation or agreement that a less cash sum than the nominal amount of the share shall be accepted as payment for the share is repugnant and void. On the other hand, there was authority for saying that the payment of a commission to brokers or others who undertook to procure subscriptions, or in default to subscribe for a certain number of shares, was legitimate. That doctrine, however, did not meet with universal acceptance, although it had the support of Buckley J. in his valuable work on the Companies Acts. (2) It was thought by some that such

(1) [1892] A. C. 125.

(2) 7th ed. pp. 609, 610.

a payment when made out of capital was a misapplication of the company's capital, and was therefore ultra vires. There were, therefore, two points for consideration: first, that shares could not be issued at a discount, i.e., subject to an agreement that the shareholder should pay less to the company than the nominal value of the share; and, secondly, the question whether the payment, out of capital moneys or by means of shares credited as fully or partly paid up, of what is called an underwriting commission was within the powers of a company.

From a perusal of the 8th section of the Act of 1900 your Lordships will infer that the Legislature was desirous of enabling remuneration to be paid for services rendered in placing or procuring subscription of the company's capital, and it appears to have hit upon what may be termed a compromise. By the 1st sub-section a company is empowered, upon any offer of shares to the public for subscription, to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, subject to certain defined conditions as to amount and disclosure. This sub-section, therefore, permits a limited application of the company's capital in payment of a commission. Then follows the 2nd sub-section, on which the question before your Lordships turns. It is in the following terms: "(2.) Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price or otherwise." And the 3rd sub-section provides that nothing in this action shall affect the power of any

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company to pay such brokerage as it has heretofore been lawful for a company to pay.

The first words to be construed are, "apply any of its shares or capital money." I think that those words naturally mean apply its capital, either in the form of shares before issue, when they may be described as potential capital, or in the form of money derived from the issue of its shares. "In payment of any commission, discount, or allowance": I think this means payment by the company. The words "discount or allowance" seem to mean the same thing, namely, a rebate on what would justly be due from the subscriber on his shares. The advantage which the appellant will derive from the exercise of his option is certainly not a "discount or allowance," because he will have to pay 20*s.* in the pound for every share. Nor is it, in my opinion, a commission paid by the company, for the company will not part with any portion of its capital which is received by it intact, or indeed with any moneys belonging to it. But the words relied on are, "either directly or indirectly," and the argument seems to be that the company, by engaging to allot shares at par to the shareholder at a future date, is applying or using its shares in such a manner as to give him a possible benefit at the expense of the company in this sense, that it foregoes the chance of issuing them at a premium. With regard to the latter point, it may or may not be at the expense of the company. I am not aware of any law which obliges a company to issue its shares above par because they are saleable at a premium in the market. It depends on the circumstances of each case whether it will be prudent or even possible to do so, and it is a question for the directors to decide. But the point which, in my opinion, is alone material for the present purpose is that the benefit to the shareholder from being able to sell his shares at a premium is not obtained by him at the expense of the company's capital. The prohibited application of the shares may be direct by allotting them as fully or partly paid up to the person underwriting the shares, or by allotting them in some other way with the intention that they shall ultimately find their way to such person or be applied in payment of his commission.

My Lords, it may be that in some particular case a contract such as that which your Lordships have before you would be open to impeachment as improvident, or an abuse, or in excess of the powers of management committed to the directors. In this case the question is as to the powers of the company itself, and not as to the due exercise of the directors' powers. I have come to the conclusion from a consideration of the language of s. 8, sub-s. 2, that the prohibition therein contained extends only to the application, direct or indirect, of the company's capital in payment of a commission by the company, and the transaction impeached in this case is not within it. It is satisfactory to find that the conclusion to which I have come will not have the effect of extending the prohibition to transactions which were legitimate before the Act, and not, so far as I am aware, open to objection on any other ground.

I am of opinion that the appeal should be allowed. I move your Lordships, therefore, that the order appealed from be reversed, and that the respondent be ordered to pay to the appellants the costs both here and below.

LORD ROBERTSON. My Lords, I agree in the judgment which has just been delivered by my noble and learned friend.

LORD BRAMPTON (after stating the facts). My Lords, this action is brought to restrain the company from carrying out their contract with the appellant Hilder, on the ground that such an arrangement is forbidden by s. 8, sub-s. 2, of the Companies Act, 1900, as being an application of shares in payment of commission, discount, or allowance in consideration of Hilder's subscribing or agreeing to subscribe for shares. I do not see any evidence which could fairly lead to such a conclusion. From first to last I find no allusion to any contract or stipulation for either commission, discount, or allowance. Hilder's allotment of 6975 out of the first issue of shares was accepted by him and fully paid for at par as a pure speculation. If it turned out badly, his 6975*l.* might have been totally lost, and he would have had to bear his loss alone, and not one

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penny could have been claimed by him as commission, discount, or allowance. I do not think this could be contested.

Now, as to the remaining 66,667 shares, which I will call the optional shares: What was the state of things on January 8, 1901, the day when the contract for the options of them was made? The directors, under art. 9 of the articles of association, had control of all the shares representing the capital of the company, with power to allot or otherwise to dispose of them to such persons, on such terms and conditions, either at a premium or otherwise, at such times as the directors might think fit. All the shares then stood at par, the par value being 1*l.* per share. There was no obligation on the directors to offer any of them to the public, and they might have issued and allotted the whole 100,000 at that price, at one and the same time, had they so pleased. There was, however, then no certainty that any of the shares would attain and maintain a premium value in the future; and the success of the mines and the development of their worth could only be ascertained by means of the working capital immediately to be raised by the allotments to the fourteen selected gentlemen I have referred to. Mr. Hilder represents the case of all.

He was willing to apply for and to risk the money he paid for his shares in the first issue on condition, but only on condition, that the options offered by the directors in the invitation to him were made to form part of his contract. By the first allotment accepting his condition the directors were bound to give him those options at the price they were offered, and when he exercised them by his notice, he became bound to take and pay for the shares at that price, and at once was placed in the same position as if he had applied for them and they had been allotted to him with the first issue when par was their true value.

It is not contended that the contract would have been illegal before the Act of 1900, and I do not think it is, so far as regards the question before us, affected by that Act.

It seems to me to have been a very reasonable and prudent contract to make when it was entered into, and in carrying it out the company will have raised, without deduction of any

kind, the whole of their authorized share capital of 200,000*l.*, as contemplated on their incorporation; the shares they deliver will be applied, not in payment of commission, but purely in fulfilment of the agreement of the directors for good consideration to allot them to Mr. Hilder, who will pay for them the price fixed when the contract was made.

I do not think *Burrows' Case* (1) (if rightly decided) is applicable to the present. It is materially distinguishable in this, that there the 15,000 shares in question were expressly agreed to be allotted at a price below the then market premium value in order to satisfy an agreed commission.

I think, for the reasons I have expressed, this appeal should be allowed, with costs.

Orders of the Court of Appeal and Byrne J. reversed with costs here and below.

Lords' Journals, August 5, 1902.

Solicitors: *Travers-Smith, Braithwaite & Robinson; Baxter, Spreat & Johnson.*

(1) [1901] 2 Ch. 23.

[HOUSE OF LORDS.]

H. L. (E.) 1902 Aug. 5.

JANSON . . . . . APPELLANT.

AND

DRIEFONTEIN CONSOLIDATED MINES, LIMITED . . . . . } RESPONDENTS.

Insurance—Capture—Property of Alien Enemy—Loss before Beginning of War—Intention to wage War—Seizure by Enemy's Government of Property of its own Subject—Validity of Insurance—Public Policy.

Where a subject of a foreign Government insures treasure with British underwriters against capture during its transit from the foreign State to this country, and the foreign Government seizes the treasure during the transit, and war is afterwards declared between the foreign and the British Governments, the insurance is valid, and an action may be maintained in this country against the underwriters after the restoration of peace, though the seizure is made in contemplation of war, and in order to use the treasure in support of the war.

The important date is the seizure before the declaration of war.

Such an insurance is not against public policy.

Public policy is not a safe or trustworthy ground for legal decision.

The decision of the Court of Appeal, [1901] 2 K. B. 419, affirmed.

THE respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellant and other underwriters, gold against (inter alia) "arrests, restraints, and detainments of all kings, princes, and people," during its transit from the Gold Mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the Government of the South African Republic. On October 11 at 5 P.M. a state of war began between the British Government and the Government of the Republic. At the time of the seizure war was admitted to be imminent.

The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic and were not subjects thereof.

The respondent company having brought an action against

the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war, and that the Blue Book might be referred to for evidence as to the facts. The action was tried without a jury before Mathew J., who held that the appellant was liable. (1) This decision was affirmed by the Court of Appeal (A. L. Smith M.R. and Romer L.J., Vaughan Williams L.J. dissenting). (2)

May 9, 12, 13, 15, 16. *Lord Robert Cecil, K.C.*, and *J. A. Hamilton, K.C.*, for the appellant. The gold was seized for the purpose of waging war against this country, and a contract of indemnity against such a loss is invalid. It is clear that it would be so if the words of the policy expressly applied to such a case. But general words will not make binding a contract which in direct terms could not be enforced. The contract here is one whereby it is sought to make a British subject liable for losses inflicted on an alien enemy by his own Government. Such a contract—the performance of which would obviously tend to diminish the stress of war for the benefit of an enemy—is one to which our Courts will not give effect. Neither directly nor indirectly is it lawful for a British subject to aid an enemy. Suppose a British financier had agreed to lend money to the Transvaal Government for war preparations, or for the equipment of an army threatening Natal; or an engineer was engaged to destroy bridges in our Colonies; or an underwriter had insured foreign ships which were seized by the country at war with us—in any such case would our tribunals enforce the contract? The respondents were alien enemies when the gold was seized. They were a corporation under the laws of the Transvaal, and as much a subject of the South African Republic as any individual could be. The corporation is distinct from its members; its status is not modified by the alleged fact that many or most of its shareholders are British subjects. The principle is well stated by Story J. in *Society for the Propagation of the Gospel* v. *Wheeler*. (3) The head-note is: "There is no

(1) [1900] 2 Q. B. 339. (2) [1901] 2 K. B. 419.
(3) (1814) 2 Gallison, 105, 131.

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legal difference as to the plea of alien enemy between a corporation and an individual"; and the judge says: "Where a corporation is established in a foreign country by a foreign Government, it is undoubtedly an alien corporation, be its members who they may; and if the country become hostile it may for some purposes at least be clothed with the same character." The contract is void whether or not it was made in contemplation of war. It is not necessary that war should actually have broken out. In *Furtado* v. *Rogers* (1) Lord Alvanley C.J. and his colleagues held that an insurance effected in Great Britain on a French ship before the commencement of hostilities between England and France did not cover a loss by British capture; and that no subject could enter into a contract to do anything which might be detrimental to the interests of his own country. To the same effect is *Gamba* v. *Le Mesurier*. (2) That the actual declaration of war is not the decisive period is shewn by several prize cases before Sir William Scott: *The Herstelder* (3), where, hostilities against the Dutch having begun on September 15, 1795, the country was considered to have been an enemy during "the doubtful state of things"; and see *The Danckebaar Africaan* (4) and *Touteng* v. *Hubbard*. (5) To the like effect are *The Boedes Lust* (6), *The Jan Frederick* (7), and *Esposito* v. *Bowden*. (8) There Willes J., in giving the judgment of the Exchequer Chamber, thus expresses the whole principle involved: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." Thus the contract is void whether made in contemplation of war or not. If the general words imply such a liability, they must be read as subject to a proviso "that the

(1) (1802) 3 B. & P. 191, 196; 6 R. R. 752.
(2) (1803 4 East, 407; 7 R. R. 590.
(3) (1799) 1 Ch. Rob. 116.
(4) (1798) 1 Ch. Rob. 107.
(5) (1802) 3 B. & P. 291; 6 R. R. 791.
(6) (1804) 5 Ch. Rob. 233, 244.
(7) (1804) 5 Ch. Rob. 127, 132.
(8) (1857) 7 E. & B. 763, 779; 27 L. J. (Q.B.) 17.

law of the country to which the insurer belongs be not contravened": *Kellner* v. *Le Mesurier*. (1) So *Brandon* v. *Curling* (2); *Aubert* v. *Gray* (3), overruling *Conway* v. *Gray*. (4)

[They also referred to *West Rand Central Gold Mines, Limited* v. *De Rougemont*. (5)]

Lawson Walton, K.C., and *Carver, K.C.* (*Scrutton, K.C.*, with them), for the respondents. The loss of the gold was within the express words of the policy caused by arrests of princes or peoples. It is for the appellant to shew why the terms of the contract should not be strictly enforced. The construction of the appellant would be an undue extension of the authorities by which the insurance of alien enemies is forbidden. The original foundation of the rule was not public policy, but the primitive conception of war which imputed mutual hostility to the individual subjects of belligerent powers. Thus, in *The Hoop* (6), all private trading with the enemy was declared to be illegal without the King's licence: "Ex natura belli commercia inter hostes cessare non est dubitandum." The matter was doubtful in Lord Mansfield's time, and the rule was only gradually introduced into the common law as an importation from Admiralty: see *Potts* v. *Bell* (7); *Bristow* v. *Towers*. (8) Insurance was only illegal because all trade between the subjects of the belligerent powers was prohibited. But a condition of actual war was absolutely essential: Hall's International Law, s. 126, p. 405, 4th ed.; Park on Insurance, vol. i. p. 520, 8th ed. In Arnould's Marine Insurance, vol. i. s. 85, 7th ed., it is laid down that all goods may be insured except those of alien enemies actually engaged in hostilities. There is no ground or authority for any enlargement of the exemption: and subject to it, the property both of subjects and aliens may be insured: see Phillips on Insurance, vol. i. par. 223; Duer on Insurance, vol. i. p. 414. The appellant is

(1) (1803) 4 East, 396, 402; 7 R. R. 581.

(2) (1803) 4 East, 410, 417; 7 R. R. 592.

(3) (1861-2) 3 B. & S. 163; in the Exchequer Chamber, at pp. 169, 182.

(4) (1809) 10 East, 536; 12 R. R. 362, n.; 15 R. R. 615, n.

(5) (1900) 5 Com. Cas. 296.

(6) (1799) 1 Ch. Rob. 196.

(7) (1800) 8 T. R. 548; 5 R. R. 452.

(8) (1794) 6 T. R. 35; 3 R. R. 113, n.

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creating a new state of things not recognised by the law: a sort of penumbra of war. There is no foundation for the language of Vaughan Williams L.J. that the enforcement of such a contract "increases the resources of the foreign country for the expected war." The illustrations of the destruction of property for strategic purposes and of the seizure of ships are inapplicable: these would constitute acts of war. Nor do the decisions cited of Sir William Scott in prize cases help the appellant; the property of the alien enemy was in the possession of the Court: *Boedes Lust* (1); the Court "decides upon the character of the property seized and on the nature and quality of the seizure." So in *Campbell* v. *Innes* (2) it was not the insurance which per se was invalid; but the action was held not to be maintainable because of the suppression of the fact that the insured was an American subject. In *Bell* v. *Gilson* (3) Buller J. said he had had many conversations with Lord Mansfield, who thought it was a good thing to promote insurances of enemy's property. In *Henkle* v. *Royal Exchange Assurance Co.* (4) Lord Hardwicke said: "No determination has been that insurance on enemies' ships during the war is unlawful: it might be going too far to say all trading with enemies is unlawful." *Esposito* v. *Bowden* (5) only deals with the state of things after the declaration of war.

Public policy is a very insecure justification of breach of contract. In *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (6) Lord Watson said: "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal." See also Jessel M.R. on the "paramount public policy" of not lightly interfering with freedom of contract: *Printing and Numerical Registering Co.* v. *Sampson.* (7) The real policy and interest of the country are that trade should be unrestricted until the actual outbreak of war. Times of

(1) 5 Ch. Rob. 233, at p. 248.
(2) (1821) 4 B. & A. 423; 23 R. R. 328.
(3) (1798) 1 B. & P. 345, 354; 4 R. R. 823.
(4) (1749) 1 Ves. Sen. 317, 320.
(5) 7 E. & B. 763, 779; 27 L. J. (Q.B.) 17.
(6) [1894] A. C. 535, at p. 553.
(7) (1875) 19 Eq. 462-65.

strained relations with other powers are frequent. It would be intolerable if on such occasions—of which the Fashoda incident is an example—trade should be suspended. Moreover, the authorities only refer to independent Sovereign States. The Transvaal was not such a State; and if these doctrines are to be applied here, they would have to be enforced in the case of a tributary State in India, a Colony, or a disturbance in Ireland. The many kinds now known of more or less subordinate States did not exist at the beginning of the last century; and it would be highly dangerous to extend these rules in accordance with the appellant's argument.

The whole argument is in fact based upon a legal fiction. The respondents being incorporated according to the law of the South African Republic are described as aliens. Technically the corporation was a subject of the Transvaal; but it was really a fictitious persona. The majority of the shareholders were British subjects, and it is they who lose, as the money was being exported to pay their dividends. That cannot be public policy by which the result is to inflict heavy loss on British subjects. Far-reaching injury might thus be caused to British enterprise, which has established railway companies in South America and invested its capital in every country in the world.

Lord R. Cecil, K.C., in reply. The prohibition of trading with an enemy except under a Royal licence is older than the case before Lord Hardwicke, and was distinctly laid down in the case of *The Ringende Jacob*, decided in 1747, and cited by Sir William Scott in *The Hoop*. (1) It is not necessary to rely on the old unqualified doctrine; but here as a fact there was a general suspension of commercial relations.

The House took time for consideration.

Aug. 5. EARL OF HALSBURY L.C. My Lords, in this case the plaintiffs, who had effected a policy at Lloyd's on a large quantity of gold which was being consigned from South Africa to London, sue on this policy, dated August 1, 1899, in respect

(1) 1 Ch. Rob. at p. 202.

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of a seizure by the Transvaal Government of the gold in question on October 2 of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and the defence to the action rests upon the proposition that the policy was an unlawful contract.

It might be the subject of debate whether I am correct in assuming what I assume for the purposes of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal Government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their minds, on August 1, the possibility and even the probability of war. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at 5 o'clock on October 11.

All the judges, with the exception of Vaughan Williams L.J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understand the reasoning of the learned Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal Government might have occurred even if war had finally been averted.

The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the State, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs.

Now, as I have said, I understand the judgment of Vaughan Williams L.J. is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the country, inconsistent with public duty, repugnant to the interests of the State, and no doubt there are equivalent phrases to be found in many judgments

where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful.

I do not think that the phrase "against public policy" is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Serjeant Marshall said in the first edition of his work on marine insurance a century ago: "To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."

But I do not think the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant

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here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe.

If this is the true view, it is not difficult to solve the question whether a contract of insurance made before a war and sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated it amounts to this—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy there can be no aid given to him. Nor is this a mere question of words: the importance of the whole region of public policy involved makes the actual existence of war at the time of the creation of the contract or its fulfilment necessary. I will assume for my present purpose (though I think it might well be debated) that the Transvaal Company did, to quote the language of Vaughan Williams L.J., "enter into this contract with a view to the imminent war which might or might not break out with Great Britain."

I note that the Lord Justice uses the phrase "imminent," and one is disposed to ask, Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal Government had been purchasing and storing up arms and ammunition to an enormous extent which could have no other object than a war with this country. Were all the contracts made with British subjects illegal? or with foreigners, breaches

of neutrality on the part of countries of which such subjects were supplying arms and ammunition to the expected enemy of the British Government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the State have created the state of war.

Bynkershoek propounds the principle: [His Lordship read a passage from Quæst. juris publici, lib. 1, cap. xxii., beginning "Præmisi quemadmodum," and ending "prohibendum est." The passage is quoted in Marshall on Insurance, 3rd ed. p. 30.] Throughout this the actual existence of the public enemy is assumed, and it is, as I have said, no mere technical phrase. It must be the enemy made so by the public authority.

In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored.

The earlier writers on international law used to contend that some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions: "Quand le conducteur de l'état, le Souverain, déclare la guerre à un autre Souverain on entend que la nation entière déclare la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société entière, et les nations n'ont à faire, les unes aux autres, qu'un corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de

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l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes" (Vattel, Droit des Gens, liv. 3, c. 5, § 70).

In *Muller* v. *Thompson* (1) Lord Ellenborough held that the voyage to Königsberg in 1810, though the relations were very strained between this country and Prussia, British ships being actually excluded from Prussia, and it being objected that this was an enemy's port, was lawful inasmuch as no war was declared and no act of hostility committed—we could not be said to be at war, which alone could render the voyage unlawful.

Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful; but the words "King's enemies" are a necessary feature of the last proposition.

Substituting the word "aliens," who may possibly or even probably become the King's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal.

I think no more striking example of the mischief which might result from so loose a mode of applying the principle of public policy in Courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above. Lord Mansfield had expressed the opinion that it was good policy to permit an insurance by British underwriters of enemies' goods, because we might obtain more in premiums than we should lose by capture; but this, in my view, was plainly wrong, and Valin, followed by Pothier and Emergon, denounced such insurance, and said that by the English practice one part of the nation was restoring them by insurance what another part took from them by arms.

If it were competent to a Court of law to consider the question which Vaughan Williams L.J. propounds upon prin-

(1) (1811) 2 Camp. 610; 12 R. R. 753.

ciples of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden (which, for the reasons I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not, each of the contending parties to a contract must look all round the political horizon, and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to his own country in the event of war; and I note here again the word "imminent" finds a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests.

But further, as the learned judge himself points out, the question depends, not on what afterwards takes place, but on whether the supposed contract is illegal in its inception. The learned judge says, "the accident of no war occurring would merely prevent any claim arising, but would not affect the legality of the contract or its construction." I think the learned judge is mistaken here, because the Transvaal Government might have seized the gold although no war had taken place; but the proposition is one which discloses the impolitic nature of such a principle. The Courts would have to consider whether war was probable or "imminent," and the contract would have to be regarded as illegal, not because war occurred, but because war was likely to occur. I cannot imagine worse public policy than this.

My Lords, for these reasons I think this appeal should be dismissed, and I only desire to add that the authorities referred to in the argument do not justify the proposition that expected wars render a contract illegal between citizens of the two nations between whom war is anticipated, and to lay down such a rule would be to establish an entirely new code for which there is no authority in the law.

My Lords, I conclude by reading the words of Parke B. on this subject when advising your Lordships' House in

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Egerton v. *Lord Brownlow and Others* (1): "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only: the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

It is not necessary to go through all the principles of law which may make a contract altogether illegal. As a wagering contract is illegal, so wills creating a perpetuity have no operation in that respect, but it is enough for the purpose I have in hand. They are defined legal principles, known to and absolutely fixed as part of our law, and a judge is called upon to bring the instrument he has to construe to the test—whether it is or is not within such principles; but I do not think he has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognised by the law.

To apply what I have said to this case, I do not deny that a judge has a right to consider whether the thing incriminated is an adherence to the King's enemies, or something calculated to assist them; but I do not think we are at liberty to consider

(1) 4 H. L. C. at p. 123.

whether the contract might be against public policy because one of the parties to it might become an alien enemy afterwards.

For these reasons I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed with costs.

LORD MACNAGHTEN (read by Lord Davey). My Lords, I assume that the corporation, which was plaintiff in the action and is now respondent here, was to all intents and purposes in the position of a natural-born subject of the late South African Republic. I do not think it can be entitled to any exceptional favour or to any peculiar indulgence by reason of the fact, if it be a fact, that the bulk of its shareholders were of European nationality. If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.

I assume, further, that the seizure which has given rise to the claim on which the action is founded was made by the Government of the South African Republic in immediate contemplation of war with this country, which that Government was then determined at all hazards to bring about unless this country would submit to conditions which no Sovereign State with a particle of self-respect could entertain.

Notwithstanding these assumptions, and notwithstanding the very able argument of the learned counsel for the appellants, it seems to me to be perfectly clear that there is no defence to the action.

I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. It is not, I think, for private individuals to pronounce upon the foreign relations of their Sovereign or their country and to measure their own responsibilities arising

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out of civil contracts with foreigners by a standard of public policy which they set up for themselves, even though their views may be right in the abstract and might possibly find acceptance with a jury of their countrymen if such a question were within the competence of such a tribunal. Public policy, in my opinion, requires a good citizen in matters of this sort to conform to the rule and guidance of the State. However critical may be the condition of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects.

The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the Republic and this country.

The event which happened was within the terms of the policy, and there is no ground on which the underwriters can dispute their liability.

The appeal, I think, must be dismissed with costs.

My noble and learned friend Lord Shand concurs in this opinion.

LORD DAVEY. My Lords, I do not think it necessary to state the facts of this case, or to discuss in any detail the numerous cases which were cited in the course of the argument. I should, if I were to do so, be only troubling your Lordships with a repetition of what has been said, and I believe will be said, by my noble and learned friends. I will content myself by stating concisely how the case presents itself to my mind and the conclusion to which I have arrived.

I think it must be taken that the respondent company was technically an alien, and became, on the breaking out of hostilities between this country and the South African Republic, an alien enemy. I also assume, in accordance with the decision in *Aubert* v. *Gray* (1), that the loss occasioned by the embargo

(1) 3 B. & S. 163.

placed on the goods by the assured's own Government might, in ordinary circumstances, be recovered on the policy.

My Lords, there are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i.e., a person owing allegiance to a Government at war with the King, without the King's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace.

In the present case the third rule would have constituted a defence to the present action; but the parties, being desirous to obtain a decision on the merits of the case, waived the objection. I have some doubt whether it was competent for the parties to take this course, for it humbly appears to me that, the objection being one based on considerations of public policy affecting the Sovereign, his Courts should be held bound to take notice of the plaintiff's inability to sue, and I do not think that this observation is inconsistent with *Flindt* v. *Waters*. (1) But the point is now happily academic, and I do not desire to make it a ground of judgment.

(1) (1812) 15 East, 260; 13 R. R. 457.

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Lord Davey.

Your Lordships will have observed that, in each of the rules on this subject which I have endeavoured to formulate, the actual commencement of hostilities is made the time when and the occasion on which the rule comes into operation. The learned counsel for the appellant has endeavoured to persuade your Lordships to extend their operation to a period when the relations between two Governments are strained and war is imminent, though the peace has not been broken and negotiations are still continued, on the grounds that the same principles of public policy are as applicable to such a state of things as to a time of actual hostility. In the case before us he says that the seizure of the gold by the Government of the South African Republic was in contemplation of and with a view to the eventuality of war. The seizure of the gold, however, was not in itself an act of hostility against this country.

My Lords, I am not disposed to agree to such an extension of the law, which appears to me to be unsupported by any authority. Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline. On the one hand, such an extension of the law as your Lordships are invited to lay down would certainly lead to interference with the lawful contracts and commercial pursuits of the King's subjects. It might conceivably precipitate a state of war which it was the object of statesmen to avert; and I think there is great force in the observation made by Romer L.J. as to the difficulty of determining the intention of a foreign Government, and the embarrassment which might ensue from our Courts being obliged to decide a question of that kind as one of fact. I quote the following passage from the judgment of the learned Lord Justice: "I think the intention of a foreign Government at any given time ought by these Courts, for such a purpose as that which I am now considering, to be treated as conclusively determined by the way in which our Government chooses or has chosen to deal with that foreign Government, and that where our Government has not treated the foreign Government as being hostile at a particular time, our Courts ought not to try and ascertain what was then in the minds

of the King, President, or responsible Ministers, or authorities of the foreign Government."

Against these considerations is to be set only the possible but somewhat remote advantage to our Government which might accrue from the enforcement of the rule contended for by the appellant.

My Lords, I prefer to abide by the limits of the law as laid down in the decided cases and by the text-writers, and I therefore think that the decision of Mathew J. and the Court of Appeal should be affirmed.

LORD BRAMPTON (read by Lord Lindley). My Lords, I am of opinion that the respondent is entitled to your Lordships' judgment. At first sight the case may appear to be fraught with difficulty; but when the material facts, which are few and simple, are ascertained and understood, the difficulty will, as I think, be found to be more apparent than real.

The plaintiff is a company incorporated under the laws of the South African Republic for the purpose of working gold mines therein. The majority of its shareholders are subjects of the United Kingdom. The company has an office and a committee of management in England, and it was a custom of the company to transmit to this country gold bullion for sale and distribution of the profits amongst its shareholders. The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders.

In the early autumn of 1899 the company was, in the ordinary course of business, about to send to the United Kingdom a large amount of such bullion, and on August 1 it effected a policy of insurance on its transit from the mines to England with underwriters at Lloyd's, the defendant, a British subject, being one. On October 2 the bullion was placed in the mail train at Johannesburg for conveyance to Cape Town en route for its destination. It reached Vereeniging, the frontier station of the Republic, in safety; but on its arrival there it was seized and appropriated by the then Government of the Republic, and became totally lost to the plaintiff. When the bullion was so seized there can be no

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doubt that the friendly relations between this country and the South African Republic were much strained; but both countries were negotiating for a settlement of their differences, and it was not until the afternoon of October 11 that war was declared between them, from which date they continued in open hostility until the end of May, 1902. The action was commenced on January 30, 1900, the crucial issue between the parties being whether war had been commenced, or a state of hostility equivalent to a state of war, so far as the insurance was affected, was in existence between the two countries when the seizure was made on October 2, 1899. If the answer was in the affirmative, the plaintiff, as a subject of the Republic, could not recover upon his policy against the defendant, an English subject and an alien enemy of the plaintiffs' country; for, although covered by the words of the policy, it would have been a loss happening during the existence of hostilities, and within the proviso which, according to the language of Lord Ellenborough in *Brandon* v. *Curling* (1), is in all cases considered as engrafted in every insurance, namely, "that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer." The reason he assigns for this is, "because, during the existence of such hostilities, the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." The law is in other words also explained by Willes J. in delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (2): "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." If, however, the answer to the issue between the parties ought to be, as I think it was, rightly found by Mathew L.J., in the negative, the plaintiff company was clearly entitled (subject to a point which was waived) to

(1) (1803) 4 East, 417; 7 R. R. 592.

(2) 7 E. & B. 779.

recover its loss from the defendant, for both the making of the contract of indemnity and insurance and the loss by seizure—which was simply an outrage by the Republic upon its own subject—occurred before the declaration of war. By way of defence it was urged that the seizure of the bullion by the Government of the Republic was incidental to actual or expected hostilities against Her Majesty Queen Victoria, and for the purpose of supplying the Republic with funds to levy war upon Her Majesty, and that, coupled with the actual declaration of war which followed, created a state of hostility against Her Majesty, and rendered the plaintiff's claim for indemnity contrary to public policy and irrecoverable.

This contention, though very ingenious and exceedingly well argued by the learned counsel, affords, in my opinion, no bar to this action. It was an endeavour to extend the well-established principle described by Lord Ellenborough so as to meet the circumstances of this case, in which undoubtedly hostile intentions were made manifest by word and by action during the time negotiations for peace were being carried on, though no declaration or act of war was made or done until after the British Government had signified by silence, on October 11, the non-acceptance of the ultimatum of the Republic received on the previous day. No decided authority supporting this contention was cited to your Lordships, while, in my opinion, reason and good sense are against it.

Every prudent Government naturally endeavours and takes steps to place itself in a condition to uphold its own country in the possible event of a state of hostility arising with any other power, and it would indeed be strange that a declaration of war should be held to have relation back to an indefinite period of time during which both the hostile countries believed themselves to be and conducted themselves towards each other as in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace. I do not think it necessary to say more.

In my opinion the judgments of Mathew L.J. and of the majority of the Court of Appeal ought to be upheld, and this appeal dismissed with costs.

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LORD ROBERTSON. My Lords, the fullness with which this very interesting case is being discussed by some of my noble and learned friends may absolve me from saying more than a few words. I agree that the appeal ought to be dismissed, but I wish to rest my concurrence on one definite ground, namely, that at the date of the seizure the South African Republic was not at war with Queen Victoria. That this company was a Transvaal subject, and that the nationality of its shareholders is immaterial; that the gold was seized as sinews of a war against Great Britain intended by the seizers and morally inevitable: these propositions I accept as the conditions of the argument; and it is obvious that the circumstance that this gold was insured lessened pro tanto the pressure of the war once it broke out.

But then the question is, Does this state of facts bring the case within any prohibition of the common law? Now, after very careful consideration of this question and with a high appreciation of the judgment of Vaughan Williams L.J., I am satisfied that, near as in every sense the state of things at the time of the seizure was to war, it is yet separated from it by a line of the sharpest and most definite kind. It cannot be affirmed that at the moment in question there was a state of war between this country and the Transvaal. That the Transvaal was a future enemy, an intending enemy, that she was arming, and that this seizure was an act of arming—all this I assume and I believe; and if the principle of the cases about actual war really involved cases of impending war, I should not be deterred by the absence of any former decision from applying it. But for the purposes of the present question there are, as it seems to me, but two categories—war and not war; and the difference between the two things is essential. The present case is perhaps as strong a case as can occur, but in it war was still a contingency or futurity. To extend the law's prohibition of trading with the King's enemies to future or contingent enemies would be subversive of the broad and palpable distinction between peace and war, would be unworkable in practice, and productive of endless uncertainty and loss. I mention these considerations not as if we were here as

legislators, or had to decide upon a balance of general considerations. But the question whether it is workable or salutary is one of the tests of any legal doctrine, and I am satisfied that the law against trade with enemies is inapplicable to the events now in question.

LORD LINDLEY. My Lords, I will not detain your Lordships by recapitulating the facts of this case. I will only ask your Lordships to bear in mind that the policy was effected and the loss of the goods insured took place before war was declared or broke out. These facts are of cardinal importance.

Before considering the legality or illegality of the policy, it is desirable to consider the legal position of the company assured by it. The company was incorporated and registered according to the laws of the Transvaal, and it carried on business there. It had gold mines there and extracted gold from them, and sent such gold to England or Europe for sale and division of profits amongst its shareholders. It had also a London office and London committee of management. For all purposes material for the determination of the present appeal the company must, in my opinion, be regarded as a company resident and carrying on business in the Transvaal although not exclusively there. It was subject to the laws of that country. When war broke out the company became an alien enemy of this country: see the American case of *Society for the Propagation of the Gospel* v. *Wheeler*. (1) If it becomes material to attribute nationality to the company it would, in my opinion, be correct to say that the company was a Transvaal Company and a subject of the Transvaal Government, although almost all its shareholders were foreigners resident elsewhere and subjects of other countries. But when considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *McConnell* v. *Hector*. (2) Again, the subject of a State at war with this

(1) 2 Gallison, 105.

(2) 3 B. & P. 113; 6 R. R. 724.

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country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses: *Wells* v. *Williams*. (1) As observed by Sir William Scott in *The Yonge Klassina* (2), "a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively, in those countries. That he has no fixed counting-house in the enemy's country will not be decisive." See also *The Portland*. (3)

I pass now to consider the seizure and its effect on the rights of the assured against the underwriters.

The risk of loss by seizure by a foreign Government was clearly insured against in the sense that the general words of the policy covered such a risk. But even if this particular risk is one which cannot be lawfully insured against, the fact that the general words cover it does not render the policy illegal ab initio; the only consequence is that the general words must be read as subject to an implied proviso that they are not intended to cover and do not cover any risk against which it is unlawful to insure. Therefore, if the seizure in question could not be lawfully insured against, the general words ought not to be held to cover it. This rule for dealing with general words in policies of insurance was formulated and acted upon in *Furtado* v. *Rodgers* (4) and *Kellner* v. *Le Mesurier* (5), and has been recognised ever since. In those cases it was held that general words did not cover loss by capture by British forces of an enemy's goods insured before war broke out.

The policy being effected before war broke out, it is not invalid upon the ground that it was when made a contract with a then alien enemy; nor can it be treated as an invalid contract ab initio by reason of the generality of its terms. This was in fact conceded by the counsel for the appellants in

(1) (9 W. 3) 1 Ld. Raym. 282; 1 Salk. 46.
(2) (1804) 5 Ch. Rob. 302–3.
(3) (1800) 3 Ch. Rob. 41.
(4) 3 B. & P. 191; 6 R. R. 752.
(5) 4 East, 396; 7 R. R. 581.

his reply. The question then is reduced to this: Is the seizure in question one which it is unlawful to insure against?

My Lords, one ground, and one ground only, is invoked to shew that it is, and that ground is the ground of public policy. A contract or other transaction which is against public policy, i.e., the general interest of this country, is illegal (1); but public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B. and Parke B. in *Egerton* v. *Brownlow*. (2)

The seizure of the gold in the present case was a distinct gain to the captors. To indemnify the owner of the gold against the loss of such gold is clearly a benefit to the owner, and such an indemnity is a benefit to a person who is regarded as an enemy as soon as war breaks out. But he was not an enemy when the policy was effected nor when the gold was seized, and how it can be against the policy of this country to keep faith with him when the war is over I fail to see. He cannot, of course, sue in this country during the war if the defendants raise that objection; but they do not. The contention is that if the war were over this action could not be maintained.

Reference was made in the argument to such cases as *The Jan Frederick* (3) and *The Boedes Lust* (4) to shew that contracts made before war breaks out, but in contemplation of it, for the protection of enemy's property against British capture, will not be recognised in this country. This is intelligible enough; for to recognise such contracts would be to defeat the object of this country in effecting the capture. It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces. Anything which would produce, or be calculated to produce, such an effect as that would be clearly against public policy, and be judicially dealt with accordingly. I am unable myself to bring the present case within this principle. The view that public policy requires an extension of rules already recognised so as to meet the present case has been very clearly presented by Vaughan

(1) 4 H. L. C. 161, 195–6.
(2) 4 H. L. C. 106, 123.
(3) 5 Ch. Rob. 129.
(4) (1804) 5 C. Rob. 233.

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Williams L.J. in his judgment. I am unable, however, to arrive at the same conclusion. His view appears to me to be based on the doctrine which identifies every subject of a State with its own Government.

This doctrine was no doubt laid down in *Conway* v. *Gray* (1), and so long as that case stood there was authority for the proposition that an ordinary policy of insurance does not cover a loss occasioned by the seizure of the assured property by the Government of the country of the assured. But even before 1861 this doctrine can hardly be said to have been regarded as settled law; it has never been accepted in America. The subject was carefully examined in the 2nd edition of Arnould on Insurance, vol. ii. pp. 803 et seq., and in 3 Kent's Commentaries, vol. iii. pp. 292 et seq. In 1861 *Aubert* v. *Gray* (2) finally repudiated any such general doctrine in this country. It was, however, unnecessary in that case to decide whether such a seizure would be covered by a policy if the seizure occurred during or in contemplation of war with this country. The Court left this point open; but *Conway* v. *Gray* (1) does not cover it, for the embargo there in question was not an act of hostility.

A seizure after war has broken out is very different from a seizure before war has been declared or has actually commenced. It appears to be settled that a British subject cannot even before war insure a person against any loss sustained by him after the war began and whilst he is an enemy of this country: see *Furtado* v. *Rodgers* (3) and *Brandon* v. *Curling*. (4) Those were cases of capture after war, by the British forces in the first case, and by our allies in the second case; and these authorities go far to shew that if the seizure here had been after war had broken out the policy would not have covered such a loss.

But, apart from *Conway* v. *Gray* (1) and others based upon the doctrine there laid down and now exploded, there is no authority for saying that an insurance effected before war does

(1) 10 East, 536; 12 R. R. 362, n.; 15 R. R. 615, n.
(2) 3 B. & S. 163.
(3) 3 B. & P. 191; 6 R. R. 752.
(4) 4 East, 410; 7 R. R. 592.

not cover a seizure of the insured property by the Government of the assured in time of peace, even if war with this country is imminent and shortly afterwards breaks out between that Government and our own.

In Arnould on Insurance, vol. i. p. 135, 6th ed., it is stated generally, "Where the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities and revives on the restoration of peace." For this is cited *Flindt* v. *Waters* (1), which warrants the author's statement.

That case is also useful as shewing that, where the insurance is legal in its inception and the loss occurs before war, an action on the policy may be successfully brought even during war if the underwriter does not put on the record a special dilatory plea. The case is an authority for the course taken in this case of obtaining a decision of the controversy between the parties on its merits without waiting for the termination of the war. The general rule laid down in Arnould is a sound intelligible working rule, and covers the present case.

I agree with Vaughan Williams L.J. in thinking that *Aubert* v. *Gray* (2) does not quite cover this case; but I cannot agree with him in thinking that public policy requires that this action should be decided in favour of the underwriters.

War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading: see *Esposito* v. *Bowden*. (3) But threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyze commerce, and often without any real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the Governments concerned? It must be

(1) 15 East, 260; 13 R. R. 457. (2) 3 B. & S. 163.
(3) 7 E. & B. 781 et seq.

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remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection: what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of the country. Romer L.J. saw this, as is apparent from his judgment.

My Lords, where a policy of insurance is not void ab initio, and a loss from one of the perils insured against happens before war is declared or breaks out, what defence can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war. Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country: *Le Bret* v. *Papillon*. (1) Your Lordships are asked to invent a new defence unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied condition that it shall not be seized by his own Government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would paralyze legitimate trade and be entirely against the interests of this country.

In my opinion the order and judgment appealed from should be affirmed and the appeal be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 5, 1902.

Solicitors: *Waltons, Johnson, Bubb & Whatton; Wm. A. Crump & Son.*

(1) (1804) 4 East, 502; 7 R. R. 618.

[HOUSE OF LORDS.]

STEAMSHIP "BALMORAL" COMPANY, LIMITED . . . . . } APPELLANTS; H. L. (E.) 1902 Aug. 5.

AND

MARTEN . . . . . RESPONDENT.

Insurance (Marine)—Policy—Ship valued for Policy at less than Real Value—General Average Loss—Salvage—Liability of Underwriter.

In an insurance on ship, cargo and freight the ship was insured for the sum at which she was valued in the policy. During the currency of the policy a general average loss occurred and a sum awarded in a salvage action had to be paid. In the salvage action the value of the ship was proved to be above the policy value. In the average statement the proved value was taken as the contributory value of the ship, and the rights of all parties were adjusted on that footing. In an action on the policy:—

Held, that the underwriters were liable only for that proportion of the salvage and general average losses which the policy value bore to the proved value.

The decision of the Court of Appeal, [1901] 2 K. B. 896, affirmed.

THE facts arising on this appeal are stated concisely in the judgment of Lord Macnaghten and in detail in the judgment of Lord Brampton. Bigham J., who tried the case without a jury, gave judgment for the defendant in accordance with the principle stated in the head-note (1), and this decision was affirmed by the Court of Appeal (A. L. Smith M.R., Vaughan Williams and Stirling L.JJ.) (2)

The pith of the argument on both sides is put in Lord Macnaghten's judgment, and the arguments are discussed amply in the other judgments.

June 19, 20. *J. A. Hamilton, K.C.*, and *Leck*, for the appellants, and

Pickford, K.C., and *Scrutton, K.C.*, for the respondent, went through the following cases: *Aitchison* v. *Lohre* (3), per Lord

(1) [1900] 2 Q. B. 748.
(2) [1901] 2 K. B. 896.
(3) (1879) 4 App. Cas. 755, at pp. 760–1, 764–6.

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Blackburn (1); *Dickenson* v. *Jardine* (2); *North of England Insurance Association* v. *Armstrong* (3), per Cockburn C.J.; *Irving* v. *Manning* (4), per Patteson J.; *Dixon* v. *Whitworth* (5); *Lewis* v. *Rucker* (6); *Pitman* v. *Universal Marine Insurance Co.* (7); *Atwood* v. *Sellar* (8), per Thesiger L.J.; *Svendson* v. *Wallace* (9); *International Navigation Co.* v. *Atlantic Mutual Insurance Co.* (10); *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association* (11); *The Knight of St. Michael* (12); Phillips on Insurance, s. 1410; *The Mary Thomas.* (13)

Hamilton, K.C., in reply, cited Kennedy on Salvage, p. 119.

The House took time for consideration.

Aug. 5. LORD MACNAGHTEN (read by Lord Davey). My Lords, the question in this case is of little consequence as regards the money value of the claim. It is important in its bearing on a rule of practice which has prevailed with underwriters and average staters in this country for a long period.

Ship, cargo, and freight have had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo, and freight at risk were ascertained. There is no question as to the value of the cargo or the freight. The value of the ship was taken to be 40,000*l.*, being the amount at which it was valued in the salvage proceedings. Contribution from the ship in respect of general average and salvage charges works out at 530*l.* 8*s.* 8*d.* This amount is claimed from the underwriters. The underwriters say: "That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship was a valued policy. It was stipulated

(1) For comments on Lord Blackburn's view, see 2 Arn. Mar. Ins. pp. 792–4, 6th ed.
(2) (1868) L. R. 3 C. P. 639.
(3) (1870) L. R. 5 Q. B. 244, at p. 248.
(4) (1847) 1 H. & C. 287, at pp. 305, 307.
(5) (1879) 4 C. P. D. 371.
(6) (1761) 2 Burr. 1167, 1171.
(7) (1882) 9 Q. B. D. 192.
(8) (1880) 5 Q. B. D. 286, 299.
(9) (1882) 4 Asp. M. L. C. (N.S.) 550.
(10) (1900) 100 Fed. Rep. 304.
(11) [1894] A. C. 72.
(12) [1898] P. 30.
(13) [1894] P. 108.

that 'for so much as concerns the assured by agreement between the assured and assurers' the ship, with its machinery and everything connected therewith, was valued at 33,000*l*. As the value in the policy is so much less than the contributory value, we are only bound to pay a proportionate amount, or thirty three-fortieths of the ship's contribution." To this the shipowners answer: "You are opening the policy. The ship was fairly valued at 33,000*l*. That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a different purpose. It is impossible to determine with any degree of accuracy the value of a thing which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the 'real value' as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have had to reimburse the cost of repairs made necessary by sea damage."

Many authorities were cited, and all available text-books were referred to. But, speaking for myself, I must say that I think little help is to be obtained from text-books or reported cases. No case was cited which has more than a very remote and indirect bearing upon the question. Mr. Phillips, who upholds the English practice as against the New York practice, for which the appellants contend, puts the case very fairly when he says (s. 1410): "There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument." His conclusion is that the question must depend upon the application of "the general principles of insurance."

But, my Lords, I do not think one gets rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other. And although I think, if the matter were res integra, I should prefer the English rule, my preference would be based on this consideration—that the law of marine insurance in this country, although anomalous in many respects, is

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eminently practical. Just as the agreed value of the ship is disregarded when the question is whether a prudent uninsured owner would repair or abandon, so where there has been a value put upon the ship by a competent authority, or adopted by a competent authority, or treated as binding in a business transaction, it seems to me that that value, whether it has or has not the better right to the title of "the real value," cannot be left out of consideration. And I think it is a salutary rule and not unreasonable that the underwriters' liability under the policy should be adjusted with regard to it.

However that may be, I do not think that Mr. Hamilton, in his able argument, succeeded in proving that the English rule is contrary to principle. That being so, there is, in my opinion, an end of the case, and discussion on the comparative merits of the English rule and the New York rule becomes academical.

The rule that prevails with English average staters is a rule that has been long established. It is well known and it must have helped to form the basis of a vast number of contracts which are still running, some of which may run for twelve months to come. In that state of things it seems to me that if the English rule is to be altered, it must be altered by Parliament and not by a decision of this House. It would be open to Parliament, if it should see fit to enact a new rule, to fix a date for its coming into operation, and so avoid any semblance of injustice to those who have contracted on the footing of the old rule.

Stirling L.J., in his judgment in the Court of Appeal, expresses an opinion that, theoretically, the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. I venture to think so too. The mode of calculation adopted by the average staters seems rather too favourable to the underwriters. Suppose the value of the ship in the policy, and also for the purpose of contribution, to be 16,000*l.*, the value of the cargo and freight to be 12,000*l.*, and the total amount required to be 840*l.*, the ship would then pay four-sevenths, or 480*l.* Then suppose the ship, for the purpose of contribution, was valued at 18,000*l.*, the value of cargo and freight remaining

the same, the ship would pay three-fifths, or 504*l.*, that is 24*l.* more than if the value for the purpose of contribution had been the same as the value in the policy. But if you reduce the ship's contribution in the proportion of 18 to 16, the underwriters have only to pay eight-ninths of 504*l.*, or 448*l.*, that is 32*l.* less than would have been payable if the contributory value had been the same as the value in the policy. But there, again, the rule is well understood, and, though I do not think it is quite accurate, I do not think it ought to be disturbed.

Though the rule only speaks of general average, it has always been treated as applying to salvage expenses also. I do not think that any distinction ought now to be made between these two heads of expenditure.

The first part of the rule, which says that the insurers are not to pay more than the ship's contribution, although the contributory value be less than the value in the policy, seems to me to be unobjectionable, as the contract of insurance is a contract of indemnity.

In the result, therefore, I move your Lordships that the appeal be dismissed with costs.

LORD SHAND (read by Lord Lindley). My Lords, I am also of opinion that the appeal should be dismissed, and the judgments of Bigham J. and the Court of Appeal affirmed with costs. I confess I think the case a very clear one, and the ground of my judgment may be stated very shortly.

The policy of insurance provides that the ship, for so much as concerns the assured, by agreement between the assured and assurers in this policy, is and shall be valued at, say, 33,000*l.* In all questions of indemnity, therefore, the parties to the policy, insurers and insured, have agreed that though the ship may in truth be much more valuable, her value is to be taken at 33,000*l.* only. There is no exception. The agreement is to apply in all cases of indemnity which may arise. So if the question were one of principle merely, and the rule of custom and practice, which has been so much referred to, had never existed, the House must give effect to this stipulation or agreement between the owner of the ship and the underwriter or

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insurer, who asks that the terms of his special contract shall receive effect.

An owner may insure so as to cover his whole risk, or he may insure only to cover part of his risk, and prefer to be his own insurer in part, or, to put it in other words, to leave his ship in part uninsured. This he does if he insures his ship below her true value. Thus, having a ship worth 40,000*l.*, he may insure her for 20,000*l.* only, with a clause such as that above quoted, declaring that he has agreed that between him and the underwriter the ship shall be taken to be of that value only. What is the effect of this? Not only that the owner becomes his own insurer for one-half of the value of the ship, but he gets a present benefit. He pays only one-half of the premium which he must have paid had he insured his ship at her true value, and, on the other hand, the underwriter undertakes only the risk corresponding to the reduced premium on one-half of the real value of the ship.

In questions of salvage and general average, which at once give rise to claims of indemnity under an insurance policy, the value of the ship is necessarily a material element, for the value of the ship will, with the circumstances in which the salvage services have been given, enter deeply into the question of the remuneration to be given. Of course, that value in a question with salvors must be the real value at the time when the salvage services are rendered. Accordingly, in this case the ship was taken at her full value, and the owner had to pay a larger sum than if the value had been 33,000*l.* only. It seems to me that when he claims full relief by way of indemnity, the underwriter in his defence is simply asking that effect shall be given to his stipulation in the policy, that in all questions of indemnity the ship shall be valued at 33,000*l.* only. It follows that he is liable to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up.

I therefore agree with Bigham J. in holding that the rule or custom founded on is in accordance with sound principle; but even if that were open to question, the rule has been so long recognised and acted on that I am further of opinion with

your Lordships that effect should now be given to it, and it should continue to receive effect unless altered by legislation.

LORD BRAMPTON (read by Lord Lindley). My Lords, the steamship *Balmoral*, by a marine policy dated December 20, 1898, and underwritten by the respondent, was insured for twelve calendar months against all ordinary perils of the seas. By the policy it was agreed that, for so much as concerned the assurers and the assured, she should be valued at 33,000*l.*

In June, 1899, while on a voyage from Philadelphia to London, when near the Isle of Wight, the *Balmoral* met with so strong a gale and so heavy and irregular a sea that her tail shaft was fractured, and it became necessary to accept the voluntary assistance of the steam trawler *Amroth Castle* to tow her as they did, during two days, when two tugs, which had been engaged and hired for that purpose, took her in charge in the Downs and towed her to the Millwall Dock, London.

The cost of these two tugs was 100*l.* and formed the item in dispute of general average, and the owners of the *Amroth Castle* were awarded by the Admiralty Court as salvage the sum of 500*l.*

In the course and for the purposes of the salvage action it was proved that the contributory value of the *Balmoral* was 40,000*l.*, so that, having regard to her agreed policy value, she was under-insured to the amount of 7000*l.* In adjusting these two items as between the owners of the ship, cargo, and freight, the adjuster, taking the contributory value of the ship to be 40,000*l.*, assessed the amount to be contributed by the owners for general average at 58*l.* 6*s.* 8*d.*, and for salvage at 472*l.* 2*s.*, making a total of 530*l.* 8*s.* 8*d.* payable by the *Balmoral*.

The question has now arisen between the shipowners and the underwriters, the shipowners claiming that the whole of those amounts is payable by the underwriters, as insurers of a fully insured ship, the underwriters contending that their liability is limited to such proportion of those sums as the agreed value of the ship bears to the contributory value proved in the Admiralty Court. This would reduce their liability to thirty three-fortieths of the plaintiffs' claim, which they have always been prepared, and are willing, to pay.

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Before Bigham J. it was proved by a very experienced average adjuster, Mr. Danson, that for many years a custom had existed which certainly in and since 1874 had been adopted as a rule at Lloyd's, that when a ship is insured for less than the contributory value, the underwriter pays on the insured value. It was proved also that such custom applied to salvage as well as general average, and that salvage had until recently been always adjusted as part of a general average. The owners of the ship contended that the rule was inconsistent with the terms of the policy, for that the *Balmoral* was a fully insured ship, being valued as a whole at 33,000*l.*, and being so insured they were entitled to a full indemnity against the claims. Bigham J. overruled that contention, and refused to disregard the rule, on the basis of which, as he stated, policies for many millions had been made; and acting upon it he gave judgment for the underwriters. In that judgment I entirely agree.

I can well understand that in one sense, but in one sense only, the *Balmoral* may be said to have been fully insured as a ship—that is to say, every part of her structure forming a complete ship was in fact covered by the policy, but not to her full value, for it was expressly agreed in the policy that for all purposes of it her value should be limited to 33,000*l.*, being only thirty three-fortieths of her contributory or real value, in respect of which the salvage was awarded. In adjusting the liability of the underwriters, therefore, the amount of salvage payable by them was properly arrived at having regard to the proportion which the agreed value of the ship bore to the contributory value as proved in the Salvage Court. This was in exact accordance with the custom and rule proved by Mr. Danson.

Based, as the amount of a salvage award invariably is, upon the true contributory value of the ship and the property saved, I cannot conceive anything more unreasonable or unjust than that an owner should seek to recover from an underwriter salvage based upon a value far in excess of its insured value, and so get the benefit of an insurance (without paying the premium) largely in excess of the smaller value which as between themselves they have agreed for all purposes of the policy to treat and be bound by as if it were the real value.

Another consideration presents itself to me. It cannot be denied that, the ship being for all purposes of the insurance insured for 33,000*l.* only, the property of the owners saved by the salvors was worth 7000*l.* more than the insured amount. What sound or just reason can possibly be urged in support of the claim of the owners to be so indemnified by the underwriters, who have received from the owners no consideration for such indemnity? I can see none.

Let me suppose that the owners, having insured with the defendants in 33,000*l.* on the ship valued at that sum, had effected another insurance with other underwriters, valuing the ship at 7000*l.* to make up its full value. Would anybody question that the salvage payable on the full value of the ship would be rightly claimed and payable by contributions from both sets of underwriters in the proportions which the sum insured by each bore to the whole value of the property salved, namely, 40,000*l.*? If the assured, whether with a view to save the premiums or for any other reason, preferred to leave the 7000*l.* uninsured, they became their own insurers to that amount, and I see no reason in law or good sense why they should not bear the burden they now seek, as I think improperly, to fix upon the underwriters.

I have considered carefully the very able arguments of the learned counsel for the appellants and the cases cited in support of them, but they have not substantially affected the views I have expressed and entertain. The rule and custom of Lloyd's, upon which Bigham J. acted, is, in my opinion, sound, sensible, and legal, and I am, therefore, content to rest my judgment upon it, and agree that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, I concur. I think that, on the terms of the policy, the respondent is right.

LORD LINDLEY. My Lords, this case turns on the effect of expressing, in an ordinary marine policy, an agreed value at which the ship insured by it is to be taken as between the assured and the underwriter. The effect has to be considered

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with reference to two losses sustained by the assured, namely, (1.) his share of a general average loss; and (2.) his share of a loss sustained by reason of salvage services for which payment had to be made. The assured's share of these two losses is 530*l.*

The ship was valued in the policy at 33,000*l.* In ascertaining the amount payable by the assured for general average and for salvage the ship was valued at 40,000*l.* The underwriters thereupon contend that they are liable to pay thirty three-fortieths of the above-mentioned 530*l.* The assured, on the other hand, say that they are entitled to be paid the whole of this sum as it does not exceed the limit of 33,000*l.* The underwriters contend that their view is correct in principle and is in conformity with a long-established custom or practice at Lloyd's invariably followed in this country. The assured do not deny that the last statement is true, but they contend that the custom or practice is contrary to principle, and ought not to be judicially recognised. Bigham J., who tried the case, and the Court of Appeal have both decided in favour of the underwriters, and your Lordships are asked to reverse their decision.

Let us consider the principles applicable to the case independently of any custom or practice at Lloyd's or amongst underwriters.

The sum of 33,000*l.* mentioned in the policy is a sum agreed upon between the assured and the underwriter. No one else is in any way bound to value the ship at that sum. If, as here, a general average loss has been sustained and has to be borne by ship, freight, and cargo, according to their respective values, it is plain that the value of the ship must be ascertained in order to apportion the loss between them, and that the conventional value of 33,000*l.* must be disregarded unless the parties concerned choose to adopt it. So as regards salvage: the salvors are in no way affected by the fact that the ship has been valued at a particular sum in her policy of assurance. The value of the ship saved must be ascertained, because the amount awarded for salvage depends inter alia, and to a great extent, on the benefit which accrues to the owner of the ship,

and this benefit can only be measured in money by the value of his property saved.

But, whatever the value of the ship, when the amount payable by the underwriter to the assured has to be ascertained, her value must be treated as 33,000*l.*; and if the owner makes any claim on him based on the ship being worth more, the underwriter is entitled to say the claim is not in accordance with the bargain between them. I confess, my Lords, I see no answer to this argument. It seems to me to follow from the decision of your Lordships in *Irving* v. *Manning* (1), where the true effect of a valuation clause in a policy was carefully considered and finally settled. For the sake of avoiding all disputes in settling what the underwriter has to pay, the value of the ship is to be taken at an agreed sum.

In order to prevent abuses by over-insuring this principle may require qualification; but where, as here, the ship is under-insured, no qualification is necessary.

The notion prevalent at one time, and supported by the high authority of Mr. Benecke, that although the valuation in a policy is conclusive in the case of a total loss, yet that in the case of a partial loss the valuation may be opened, has long been exploded: see 3 Kent's Com. 274; 1 Pars. Marine Ins. 272; 1 Arn. Ins. 299 and 2 ib. 939, ed. 6. There are numerous decisions shewing this to be the case in valued policies on goods and freight (the most recent being *The Main* (2)), and I am unable to discover any reason for applying to ships a doctrine repudiated as unsound when applied to goods or freight. At the same time, I have not discovered any direct decision on this point. The principle that a valuation in a policy on ships is to be regarded in cases of partial loss was assumed to be correct in *Pitman* v. *Universal Marine Insurance Co.* (3), and was not questioned on appeal. The owners, however, contend that the underwriters have no concern with the mode in which the amounts payable for losses insured against are arrived at. The owners say they are fully insured up to a certain limit, and that if that limit is not exceeded all losses insured against must be

(1) 1 H. L. C. 287. (2) [1894] P. 320.
(3) 9 Q. B. D. 192, at pp. 201, 203.

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fully paid. This, my Lords, appears to me to ignore the difference between valued policies, as understood in this country, and open policies, and to be erroneous according to English law. The introduction of the word "fully" occasions the fallacy in the plaintiff's reasoning. It is not true to say that the plaintiffs are fully insured. If the word "fully" is introduced, it must be qualified so as to shew its true meaning, i.e., fully for a ship of the value mentioned in the policy. If in this case the ship had been totally lost the owners would have found themselves uninsured to the extent of the ship's ascertained value over 33,000*l*. To say that the whole value, as fixed in the policy, is insured, and then to treat the assured as fully insured, appears to me misleading. The contract is not fully to insure the shipowner up to a certain limit, but to insure him on the footing that his ship is to be taken to be of the value of 33,000*l*. for the purpose of ascertaining what is payable under the policy.

The foregoing observations are as applicable to losses owing to salvage as to ordinary general average losses. There is more difficulty in dealing with salvage losses, as the sum awarded for salvage services is arrived at by considering the risks and dangers encountered by the salvors as well as the value of what is saved; but this value is always a very material matter for consideration; and, other things being the same, it may for all practical purposes be fairly regarded as regulating the amount awarded when the sum payable under a valued policy has to be ascertained. So the matter stands on principle.

Let us now consider the custom or practice or rule on which the underwriters also rely. The rule is set out in the appendix. As printed the rule does not mention salvage; but it was proved at the trial that the rule is always applied to losses occasioned by salvage as well as to ordinary general average losses, and I have endeavoured to shew that this is correct in principle.

The rule, as framed, treats over-insurances and under-insurances differently. It first deals with over-insurances, and says, "If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assured on

the contributory value." If this rule is applied to a valued policy, it infringes the principle of taking the agreed value for better and for worse in ascertaining what the underwriter has to pay. This deviation from that principle may perhaps be justifiable in cases of over-insurance on the ground that it avoids all danger of fraud and endless disputes between over-insured owners and underwriters: see 1 Parsons' Marine Ins. 258 et seq., Aug. 1868. But this part of the rule is inapplicable to the present case, and it is unnecessary to say more about it.

The second part of the rule applies to under-insurances and to the present case; and, there being no danger of fraud, the rule says, "But when insured for less than the contributory value, the underwriter pays on the insured value." The rest of the rule is consequential on this. This rule is, in my opinion, not wrong, but right in principle, and is calculated to save infinite trouble. The actual method of working out the rule adopted by underwriters may not be arithmetically accurate, but it is simple and convenient; there is nothing unfair in it, it has long been adopted, and there is no justification for disturbing it.

It is true that in New York the practice appears to be in favour of the appellants, but in this respect I believe New York stands alone; and, although uniformity in these matters is greatly to be desired, your Lordships cannot, in my opinion, judicially do otherwise than dismiss this appeal. So far as the actual words of the policy go, they appear to me consistent with both rival contentions; but the English rule is more consistent than the other with the interpretation which has for years been put on valued policies in this country.

The appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, August 5, 1902.

Solicitors: *Lowless & Co.; Waltons, Johnson, Bubb & Whatton.*

[HOUSE OF LORDS.]

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DON JOSE RAMOS YZQUIERDO Y CASTANEDA AND OTHERS . . . . } APPELLANTS;

AND

CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

Practice—Parties—Title to sue—Contract entered into on behalf of a Foreign State.

There is no such rule as that the monarch or other titular head of a foreign sovereign State is the only person who can sue here in respect of the public property or interest of that State.

The Spanish Minister of Marine in Madrid and two other persons brought an action in the Court of Session against the respondents for damages for failure to deliver warships within the time stipulated by contract. The parties to the contract were described as "The Chief of the Spanish Royal Naval Commission," and "the Commissary of the Commission (mentioning their names) both in the name and representation of his Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government on the one part," and the respondents (a shipbuilding company in Scotland) on the other part:—

Held, reversing the decision of the Second Division of the Court of Session, that the Spanish Minister of Marine for the time being was entitled to maintain the action though he was not Minister of Marine at the date of the contract.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellants, Rear-Admiral Don Jose Ramos Yzquierdo y Castaneda, the Spanish Minister of Marine in Madrid, Don Manuel Diaz e Iglesias, Chief of the Spanish Royal Naval Commission, whose office is in the City of London, and Don Diego de Tapia, the Commissary of the same, brought this action against the respondents, the Clydebank Engineering and Shipbuilding Company and the liquidator thereof, for damages for breach of contracts in not delivering certain war-vessels within contract time.

(1) (1901) 4 F. 319.

The contracts in question, dated June 4 and November 24, 1896, were made in this country. The question in this appeal was whether the appellants had a good title to sue. The parties who contracted with the respondents, and in whose place the appellants now sue, were Don Manuel de la Cámara, the Chief of the Spanish Royal Naval Commission in London, and Don Nicolás Prat, then Commissary of the said Commission, "both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government."

The appellant (Don Jose Ramos Yzquierdo y Castaneda), the Spanish Minister of Marine in Madrid, did not hold office when the contracts were entered into. He only became Minister shortly before this action was raised. Notice of the change of Ministers was given to the respondents. The respondents objected to the appellants' title to sue on the ground that they had not produced any Act, order, or appointment by the Spanish Cortes, the Spanish Sovereign, or any known Spanish authority giving the Spanish Minister of Marine the right to sue on behalf of the Spanish Government, who they averred was the true dominus litis, and that they had not ever stated that they possessed such authority; accordingly the appellants in art. 11 of their condescendence made the following statement:—

"Don Manuel Diaz e Iglesias and Don Diego de Tapia are the respective successors of Commodore Don Manuel de la Cámara and Don Nicolás Prat in the offices of the Chief and Commissary of the Spanish Royal Naval Commission. The said Spanish Royal Naval Commission represents the Government of Spain and their Minister of Marine in London in regard to all matters connected with the Navy. The appellant Don Jose Ramos Yzquierdo is the successor of Don Francisco Silvela" (to whom authority to constitute the present claim was granted by the Queen-Regent of Spain in the name of the King of Spain) "in the office of Spanish Minister of Marine in Madrid. The Government of Spain is represented both in making and in enforcing contracts, and in claiming damages for the breach thereof, so far as relating to war-vessels, by the

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Minister of Marine in Madrid, and he is the person who, by the law and practice of Spain, directly represents the said Government in such matters, and is entitled to enter into such contracts and sue for damages for the breach thereof. The pursuers (appellants) have been expressly authorized and expowered by the King and Queen-Regent of Spain to prosecute the present proceedings on behalf of the Spanish Government."

In answer, the respondents maintained that—

"By the law of nations the Sovereign of a monarchial State alone has title or interest to sue for the property of the State in the Courts of a foreign State. The contracts here sued on were entered into on behalf of His Majesty the King of Spain, and were duly ratified by him, and the King of Spain alone can sue under them in the Courts of this country."

The appellants also produced a mandate dated March 27, 1901, by the Queen Regent of Spain and the King of Spain, stating that judicial proceedings on the said contracts had been commenced in Scotland by the Ministers of Marine, Don Francisco Silvela and Don José Ramos Yzquierdo y Castaneda, and by Don Manuel Diaz e Iglesias, Chief of the Naval Commission, and Don Diego de Tapia, Commissary of the same; and the mandate proceeded to give full powers to their respective successors in office to pursue this action. The appellants offered to sist the King of Spain as a pursuer along with them, but consent to this offer the respondents refused; and their consent was necessary by the law of Scotland.

On July 31, 1901, the Lord Ordinary (Lord Low) allowed the appellants a proof of their averment on the ground that, if the head of a foreign Government department is authorized by the law and constitution of that State to enter into a contract relating to his department which is binding upon that State, he failed to see any good reason why he should not have a title to enforce it. His Lordship also held that the Chief of Commission and the Commissary had not a good title to sue. But this action was well founded by Scottish law if any of the pursuers had a good title to sue.

On November 10, 1901, the Second Division of the Court

of Session (1) (Lord Young dissenting) recalled the Lord Ordinary's interlocutor and dismissed the action on the ground that the contract was one made on behalf of the Spanish State and in its interest alone, and that as that State was a monarchy the Sovereign of that State alone could sue, and that any action on the contracts must proceed in his name.

1902. July 28. *Scott-Dickson, S.-G. for Scotland,* and *Eldon Bankes, K.C.* (with them *Blackburn*), (all of the Scottish Bar except the second), for the appellants. The decision of the Court of Session was erroneous. The contract purports to be on behalf of the Spanish Minister of Marine, and he is defined as the Spanish Government, who agreed to pay the contract price. It was the intention of both parties to the contract to treat the holder of the office of Minister of Marine and his successors in office as the principal in the contract with the right to sue and be sued; and the respondents dealt with the Minister of Marine as the responsible head of that department of the Spanish Government in delivering the ships and in receiving payment of the price. The judgment against the appellants does not proceed on any technicality of Scottish law, but on the law obtained from this country—that in the case of a monarchy it is only the King who is entitled to sue in the Courts of this country in respect of the property of his State. No such doctrine exists in international law. It is not denied that it is a rule of international law that the Sovereign of a monarchical State may sue for the property of his State in the Courts of a foreign country; but this is a different thing from saying that the Sovereign and the Sovereign alone must sue. It may be that it would not be a competent defence to an action raised by a foreign Sovereign to plead that the right to sue was, by the laws of his own country, vested in a Minister of State; but that, again, is a different thing from refusing to such a Minister of State the right to sue. If he can by the laws of his country efficiently discharge the parties whom he sues in respect of the property

(1) 4 F. 319.

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of his country, it is difficult to see why he should be refused the right to sue, or why the constitutional powers and position of a Minister of State should be ignored and those of the King only recognised. The only foundation for the respondents' objection is the case of *United States of America* v. *Wagner* (1), but that case has no application to this.

[They also commented on *King of Spain* v. *Machado* (2); *Penedo* v. *Johnson* (3); *The Newbattle* (4); *Levy & Co.* v. *Thomson* (5); *Graham* v. *Tait* (6); *Larsen* v. *Ireland & Son.* (7)]

[THE EARL OF HALSBURY L.C. mentioned *Russell* v. *Da Bandeira.* (8)]

Lawson Walton, K.C., and *Ure, K.C.* (with them *Tait* and *Cassel*), (the second and third of the Scottish Bar), for the respondents. The subject-matter of the contracts were war-vessels built for the Spanish Government. If a suit is brought for damages the action should be brought by the person interested in the damages. The only person who can sue with regard to the property of a foreign State in this country is the Sovereign of the State, if a monarchical State, and, if a Republic, the head of the Republic. It follows that the King of Spain, and only the King of Spain, has a title to sue on this contract in this country. The only safeguard against constant changes of Ministers is that it is the King who must sue. An agent has no right to sue because he has no interest; nor can an administrator of the office who has no interest individually sue in this country, because a counter-claim would fail. There is no case in England where an action has been allowed to be brought by a representative of a foreign Sovereign.

[They cited *Emperor of Austria* v. *Day* (9), Chitty on Contracts, 12th ed. 327, *Penedo* v. *Johnson* (3), *King of Spain* v. *Machado* (2), *Hullett* v. *King of Spain* (10), *King of Greece* v.

(1) (1867) L. R. 2 Ch. 582.
(2) (1827) 4 Russ. 225; 28 R. R. 56.
(3) (1873) 29 L. T. (N.S.) 452.
(4) (1885) 10 P. D. 33.
(5) (1883) 10 R. 1134.
(6) (1885) 12 R. 588.
(7) (1892) 20 R. 228.
(8) (1862) 13 C. B. (N.S.) 149.
(9) (1861) 30 L. J. (Ch.) 690.
(10) (1828) 2 Bli. (N.S.) 31; 28 R. R. 56.

Wright (1), *Emperor of Brazil* v. *Robinson* (2), *Levy & Co.* v. *Thomson* (3), and *Bonar* v. *Liddell.* (4)]

No reply was called for.

EARL OF HALSBURY L.C. My Lords, with the greatest respect for the learned judges of the Second Division, I am not able to entertain the least doubt that the decision of the Lord Ordinary was right. This is no question, and it has been frankly admitted by the learned counsel on the part of the respondents that it is no question, of any peculiarity of the law of Scotland: the question here is whether or not the right parties are suing; and it appears to me to be perfectly immaterial to consider for this purpose whether or not the ultimate interest may be in the King of Spain or in whom it may be. The shipbuilders here have entered into an express contract with a person who is called in the contract the Minister of Marine of Spain to build certain ships; and what is incident to that contract, the right to enforce that contract and to enforce the penalties under that contract, is in the contracting party. That contracting party has brought the action, and it appears to me that it is imposible to say that there is no right in him to sue.

The contract itself, which seems to me to remove all difficulty in the matter, is this: "Contract entered into" "between the Chief of the Spanish Royal Naval Commission" and "the Commissary of the Commission"—mentioning their names—"both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government, on the one part, and James and George Thomson, Limited, engineers and shipbuilders, Clydebank, Scotland, in their own name and representation, on the other part." Those are the two contracting parties. Now, subject to the one point whether the words "Spanish Minister of Marine" meant the Spanish Minister of Marine at the time that this contract was entered into or meant the Spanish Minister of Marine for the time being whenever it became

(1) (1837) 1 Jur. 944.
(2) (1838) 6 A. & E. 801.
(3) 10 R. 1134.
(4) (1841) 3 D. 830, 832.

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necessary to enforce the contract or to sue for penalties, subject to that one question, it appears to me to be exceedingly plain that one of the contracting parties is the Spanish Minister of Marine, and if the Spanish Minister of Marine brings this action I can conceive no principle why the action should not lie and why he has not a right to bring the action.

Upon the question whether it means the Spanish Minister of Marine at whatever time the question should arise or the Minister who held office at the time the contract was made, it seems to me to be simply a question of construction. That question of construction comes to this: Here is a contract entered into between the shipbuilders and the department which deals with the Spanish navy, and I suppose both parties, the parties who agreed to build and the parties who agreed to pay, would reasonably have had in their contemplation the possibility that the Government might change and that the individual Minister might be altered from time to time, and that if the contract was to be available to either of the parties, either as plaintiff or as defendant, it must be with a continuity in that contractual relation which would enable the rights of the parties to be determined. Therefore, what would be the reasonable inference to be drawn from the use of such a phrase as "the Spanish Minister of Marine"? If the parties intended to confine the contractual obligation to the Minister who at the time the contract was entered into occupied that position, it would have been easy to mention his name; but it appears to me that with the object of ensuring continuity of contractual obligation the parties say in terms, This contract is with the "Spanish Minister of Marine," and, though the words "or his successors" are not used, it appears to me that that is what the contracting parties meant. That is a mere question of the construction of the contract itself, and, applying one's mind to the words of the contract itself, it appears to me to be beyond doubt that what the parties did contemplate was what I have described as the continuity of the contractual obligation. If that is so, here we have the shipbuilders on the one hand and the Spanish Minister of

Marine on the other in the proper forum in which to determine the question.

My Lords, we have had a great deal of learning on the subject of international law brought before us. Certainly some parts of it were extremely novel to me as regards the principles I have heard insisted on. I am not aware of any such principles as have been described; but, however that may be, it appears to me that the decision of this case is quite independent of such considerations. Here is a lawful contract entered into between parties ascertained, and the simple question is whether that is a contract which can be enforced in this country by the present appellants. Time presses me, and therefore I am unable to say more; indeed, had it been otherwise, I should only have said more out of respect to the learned judges from whom I am differing, because the proposition itself seems to me exceedingly plain, and I do not know that it needs further exposition. Therefore, I move your Lordships that the interlocutor against which the appeal is brought be reversed and that the judgment of the Lord Ordinary be restored.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD BRAMPTON. My Lords, I concur.

LORD ROBERTSON. My Lords, it is satisfactory in the interests of Scottish commerce to know that this judgment is not supported upon any ground peculiar to Scottish jurisprudence. There is nothing in the municipal law of Scotland which places any obstacle which is unknown in England in the way of the enforcement of contracts, and therefore in the way of the making of contracts, with foreign governments. The judgment is rested, and rested solely, on grounds common to both England and Scotland.

Now, this contract on the face of it is a Government contract. The disclosed principal with whom the respondents contracted, and by whom in the sequel they were paid, is the Spanish Minister of Marine in Madrid, "hereinafter called the Spanish Government." I pause to observe that in this country it is

H. L. (Sc.) 1902 YZQUIERDO v. CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY. Lord Robertson.

well settled that the individual officer who so contracts is not personally liable, but the liability is on the department which he represents. Therefore, it seems to me that the mere change of officer is primâ facie no objection to the title of the new Minister.

The question then is, Who is entitled to enforce this contract if art. 11 of the pursuer's condescendence be true? The substance of that article is that, according to the constitution of Spain, the proper officer to make such contracts, to enforce them, and to recover damages for their breach is the holder of this office. Now, it seems to me that the true question is this: If the appellants' averment be true, will the suit of this Minister keep these respondents safe against a subsequent demand by the King? Beyond this, on principle and on authority, they have no interest to criticise the manner in which the foreign Government sues. Well, the averment of the appellants is quite explicit on this point. When the appellants say that by the constitution of Spain this Minister has right to recover this money, they say in so many words that the King is bound by this Minister's acts done in his region and province.

Now, the theory of the Second Division is that, even if this be the constitution of Spain, the King alone can sue in our Courts. This seems to me not only unsupported by international law, but contrary to principle. While, apart from more particular information about the country in question, our Courts will assume that where there is a monarch public property is vested in him, this does not touch the present case. In the first place, it proves no more than that the King may sue, not that he must sue. But further, the present is not a question as to the person in whom the property is, but in whom is the legal right to administer this property; and the 11th article of the condescendence says that the right to deal with this particular property is, by Spanish law, where the contract would lead one to expect it to be, and that is in the Minister for whom the contract was made.

I may add that, in applying to the present question the general law of agency, it is illegitimate to assume that the agent has merely the ordinary power of an agent. The gist

of the 11th article of the condescendence is that the agent (if you choose so to call the Minister) has by law the execution of powers which are indeed in theory vested in the sovereign, but not to any effect which touches the interests of the other party to the contract.

LORD LINDLEY. My Lords, I am of the same opinion.

Ordered, That the interlocutors appealed from be reversed; and that the respondents pay to the appellants the costs both here and below.

Lords' Journals, July 28, 1902.

Agent for appellants: *J. T. Davies, for Macandrew, Wright & Murray, W.S., Edinburgh.*

Agents for respondents: *Ashurst, Morris, Crisp & Co., for Forrester & Davidson, W.S., Edinburgh, and M'Gregor, Donald & Co., Writers, Glasgow.*

[PRIVY COUNCIL.]

J. C.* 1891 Nov. 20. 1902 June 18.

GODFRAY. . . . . PLAINTIFF;

AND

THE CONSTABLES OF THE ISLAND OF SARK . . . . . } DEFENDANTS.

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY.

Law of the Channel Islands—Title to Right of Way by the Public—Grant—Effect of Delay in suing after attaining Majority.

In the Channel Islands, where the doctrine of dedication to the public is unknown, (1.) title to a right of way must be made out by the public as by a private individual, by either grant or prescription; (2.) a grant must be matter of record; and, *quære*, whether prescription will avail without proof of title:—

Held, in an action by the appellant to have it determined that the public had no right of way over his property, that a registered minute of a resolution of the Seigneur and resident tenants of the Island of Sark, where it was situated, which did not duly record a completed transaction of grant, being rather a note of an unaccepted offer, was neither in form nor effect sufficient to create a title in the public:

Held, also, that a minor is not required to bring an action of title within a year of his majority.

APPEAL from a judgment of the Royal Court (June 16, 1896), whereby it was determined that the public have a right of way over a certain tunnel cut through a hill called La Moie du Creux, the property of the appellant.

The action was brought by the appellant for a declaration that the tunnel was his private property and that the public had no right of way through it.

The respondents, admitting his title to the hill and soil of the tunnel, relied upon public user of the tunnel since 1866, and upon a resolution dated July 11 of that year, set out in their Lordships' judgment, and appearing in the register of the Island of Sark.

* *Present:* LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

The appellant contended that the passing of the resolution was not evidence of the consent therein mentioned having been given by Thomas Godfray; that Thomas Godfray, as the appellant's guardian, had no power to grant or release the use of the tunnel to the public or to any person or persons whatsoever, or (in the alternative) that he had no power so to do except with the consent of the Conseil de Famille, which was not obtained; that no such grant or dedication could be made by any person except by a contrat (or conveyance) duly passed before and attested by the Seneschal of the Royal Court of Sark, or passed before and attested by the bailiff (or president), and two jurats of the Royal Court of Guernsey, and registered after presentment in one of those Courts, and that the above-mentioned resolution was not, nor was the consent therein referred to, a contrat inter partes, or at all, nor was the contrat (if any) attested or registered in the proper Court; that land in the Island of Sark could not be subdivided or subjected to any fresh burden or servitude, or (in the alternative) could not be so subdivided or subjected except with the licence of Her Majesty in Council, which was not obtained; that assuming that an agreement was constituted by the resolution or otherwise for a grant of the right of way claimed, then such agreement would not according to the law of the Island of Sark be ordered to be specifically performed, and the only remedy for breach thereof lay in damages; that neither the meeting nor any of the persons present thereat or acting under the resolution had any power to alienate or make over to the appellant the land behind the fountain referred to in the resolution (which was public property), and that the appellant therefore obtained no title to such land, and the alleged grant of a right of way (if made) was made without consideration; that the land behind the fountain (which is in area only one-tenth of the way through the new tunnel) was in fact of no value to the appellant, and in the circumstances he had no desire to retain the same; that the alleged use of the new tunnel by the public since the year 1866 was not proved, and if proved would not create any right in the public or in the inhabitants of the island to continue such use.

J. C. 1902 GODFRAY v. CONSTABLES OF THE ISLAND OF SARK.

G. Cave and *W. Carey*, for the appellant, contended that the finding of the Royal Court in favour of the right of way claimed was against the weight of evidence. It was clearly proved that the tunnel was the exclusive property of the appellant. It was not proved that there had been any grant of or acquisition by the public or inhabitants of the island of any right in or over the same. It was essential for the respondents to prove a valid grant of a right of way in their favour by the owner. No length of public user was evidence of a right to continue such use in Sark any more than in Jersey or the other Channel Islands: see *De Carteret* v. *Baudains*. (1) At all events, the user admitted in this case would be totally insufficient for that purpose. The resolution was not a completed contract, and was of no effect as a grant. Even if it were a contract, specific performance is not a remedy obtainable in Sark, but only damages.

Younger, K.C., and *C. M. Le Breton*, for the respondents, contended that the resolution of July 11, 1866, constituted a valid and binding agreement. It was passed by a special assembly of the Seigneur (of whom the Seneschal is merely the deputy and subordinate) and tenants of the island authorized by a previous Act of the Chief Pleas, and an entry was made in the island register by the greffier, and consequently all the formalities prescribed by the law or custom of the island were observed. Even apart from the validity of the agreement, the proceedings manifested an intention on the part of Thomas Godfray, as guardian, to dedicate to the public the highway through the tunnel. The highway having in consequence been thrown open to the public and used by them ever since, and maintained at the public expense, the dedication has been proved to have been accepted by them and is irrevocable. Delay, moreover, is fatal to the appellant. He is only allowed by the law and custom of Guernsey, in whose Courts he sued, a year after attainment of his majority in which to dispute any act of his guardians relating to real estate: see Terrien's Coutume de Normandie, livre ii. c. 5, p. 23. The appellant took no steps to dispute the act of his guardian prior to this

(1) (1886) 11 App. Cas. 214.

action, which was brought long after the expiry of the year of grace. On the contrary, he adopted his guardian's act by taking and retaining land exchanged for the right of way.

Cave replied.

1902. June 18. The judgment of their Lordships was delivered by

LORD DAVEY. Their Lordships have delayed their judgment in this appeal in order to give the parties an opportunity of settling the question between them by some reasonable compromise. They are, however, informed that the parties have not succeeded in doing so, and they must, therefore, give their judgment according to the strict legal rights of the litigants.

The appeal is from a decision of the Royal Court of the Island of Guernsey, dated June 16, 1896, whereby it was determined that there is a public right of way through a tunnel which has been cut in a hill called La Moie du Creux, in the Island of Sark, within the bailiwick of Guernsey, which is the property of the appellants. The hill abuts on a harbour called Le Havre du Creux, which is wholly inclosed by cliffs, and the communication with the interior of the island is by two artificial tunnels cut through the cliffs. One of these tunnels was constructed many years ago, and has always been open to public use, but the other (which is the tunnel now in question) was cut through La Moie du Creux in or about the year 1866 in the circumstances presently mentioned.

In 1894 or 1895 a portion of the roof of this tunnel fell in consequence of certain mining operations of the appellant, and differences arose between the appellant and the public authorities of the island as to the liability for the repair of the tunnel. In the result the appellant commenced the present action in the Royal Court of the Island of Sark against the Constables to have it determined that the tunnel was his property, and that the public had no right of way through it. The Seneschal, who is the judge of that Court, having declined to adjudicate in the action on the ground of his relationship to the appellant, it was transferred to the Royal Court of

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Guernsey. The latter Court by its judgment of March 14, 1896, dismissed the action with costs, and this judgment was affirmed by the Full Court on the following June 16.

It was not contested that the appellant is the proprietor of La Moie du Creux and of the soil of the tunnel. On the other hand, it was not contested by the appellant that the tunnel had de facto been used by the public as a road to the harbour since its construction in or after the year 1866. The respondents relied upon this public user, and also upon a certain resolution of July 11, 1866, a minute of which is found in the public register of the Island of Sark. It was argued that the resolution explained and gave a sufficient title for the public user.

The minute in question (when translated) is as follows:—

"At an extraordinary meeting of the Seigneur and resident tenants of this island, authorized by order of the Chief Pleas (Chefs Plaids) of Easter last and held on the 11th July, 1866.

"In view of the necessity of cutting a new tunnel and removing a part of the soil of La Moie du Creux, Mr. Thomas Godfray, Seneschal, natural guardian of Alfred Godfray, a minor, the owner of the said soil, this day consented to give and release in perpetuity for himself and his heirs to the public the right of passage through the said tunnel, on condition of having in perpetuity for himself and his heirs the land behind the public fountain of La Sécherie du Creux."

The tunnel was made (it is said) at the public expense, and the appellant was put into possession of the piece of land behind La Sécherie. And if this case had arisen in England, there would be evidence of the dedication to the public by the appellant of the way through the tunnel, and probably a contract would be inferred from the actings of the parties on the resolution of July 11, 1866, of which a Court of Equity would decree specific performance.

In the Channel Islands, however, the doctrine of dedication to the public is unknown, and the public, like a private individual, must make out their title to a right of way by grant or prescription. It was argued before their Lordships that no length of user without title will give right to a servitude, or

at any rate that the shortest period of prescription is forty years. Their Lordships on this part of the case will repeat what was said by Lord Blackburn in delivering the judgment of this Board in the case of *De Carteret* v. *Baudains* (1), which was an appeal from the Royal Court of Jersey: "If the law of England prevailed in Jersey, and a public right of way in the nature of an easement over the soil of another could be created by a mere dedication by the owner of the fee simple at any time, and a using of that way so dedicated for a term however short, it may be that this" (referring to some evidence of user in that case) "would be some scintilla of evidence of a dedication by Charles, the grandfather. But this is so far from being the law of Jersey that the doubt is whether an easement or servitude can be created by any enjoyment even from time immemorial without proof of title. Their Lordships wish not to be understood as deciding a question which does not arise. It may be, or it may not be, that a forty years' possession by the parish of a way as a public way accompanied by acts of ownership, such as repairing the road, cutting the boughs, and so forth, would prove that the soil was in the parish, or it might perhaps be sufficient title to support a servitude in the parish. On this they give no opinion."

Nor is it necessary now for their Lordships to give any opinion on this somewhat difficult question, for the length of user of the tunnel by the public before action did not exceed thirty years. Their Lordships were not referred to, and are not aware of, any authority for thinking that the law in the Island of Sark differs for the present purpose from that of Jersey, and, indeed, the learned counsel for the respondents, who argued this case with great zeal for their clients, did not contend that they could rely upon the public user alone.

By the law prevalent in all the Channel Islands, the conveyance of land and of rights of user and occupation of land is matter of record. A "contrat" is acknowledged by the parties before and attested by the Royal Court of the Island, and a minute of the "contrat" is then entered in the register of the Court. In Sark the Seneschal is the judge of the Royal Court,

(1) 11 App. Cas. 214.

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and the presence of jurats is not required. It is not necessary that the "contrat" should be in writing, or signed by the parties to it, but it must be acknowledged by them, and a minute containing the terms must be registered. There is no Court which can decree specific performance of a private contract, or which administers the equities familiar to English lawyers arising out of part performance, acquiescence by the vendor in expenditure of money by the purchaser on the faith of the contract, or other similar equities.

All this was admitted by counsel for the respondents; but it was contended that the registered minute of the resolution of July 11, 1866, was such a minute of a "contrat" acknowledged before the Seneschal, who it was assumed was present at the meeting, as would satisfy the requirements of the law.

To this argument several answers were made by the appellant. In the first place, it was pointed out that the meeting at which the resolution was passed was not a meeting of the Chefs Plaids themselves, but a meeting convened by the authority of that body for the purpose of advising them, or for inquiry, and, as appeared from a registered minute of the previous meeting of the Chefs Plaids, without any power to bind them by a contract for the tunnel. The meeting was, it appears, directed to be held only in reference to a project for the construction of a breakwater. The resolution itself does not purport to record the terms of a concluded contract, or to be more than a note of an offer made by Mr. Godfray in the course of the proceedings. Secondly, it was said that it does not even appear that Mr. Godfray was present in person at the meeting, and that, if he was so, he was not there in his capacity of Seneschal holding a Court, but as a party making an offer, and there was no one present accepting the offer or empowered to accept it, and it does not purport to be accepted so as to make a contract. Thirdly, it was said that it was not registered in the proper register as a contract or act of the Court, and in support of that statement the certificate of the greffier printed in the record was referred to. In answer to a suggestion rather faintly put forward that Mr. Thomas Godfray, the Seneschal, being one of the parties it was not possible for the

contract to be acknowledged before himself, it was pointed out it might have been acknowledged before the Royal Court in Guernsey and registered there, as was in fact done when the property was conveyed to him in 1862 as guardian of his son, the present appellant.

Their Lordships are constrained to say that they think the answer given by the appellant to the respondents' argument on the form and effect of the minute of the resolution is sufficient. They cannot hold either that Mr. Thomas Godfray, if present, was acting as Seneschal and judge of the Royal Court for the purpose of taking the acknowledgment of a "contrat," or that the minute records a completed transaction, or is more than a note of Mr. Thomas Godfray's offer. They must, therefore, hold that there is no conveyance or grant of the right of way claimed, or contract for the grant of it, to which effect can be given in the Court of the island.

One other argument on behalf of the respondents must be mentioned. It was said that the appellant, who was a minor in 1866 and attained the age of twenty years (which is the age of majority in the Channel Islands) in 1876, was precluded by his delay in bringing the present action. In support of this argument reliance was placed on a law and custom of Normandy which is thus stated by Terrien, livre ii. c. 5, p. 23: "Pource que ceux qui sont en nonage doivent estre tenus en garde tant que les vingt ans soyent accomplis; on leur donne un an par l'usage de Normandie en quoy ils peuvent faire en cour clamer et rappeller par enqueste les saisins de leur antecesseurs et de ceux de qui les eschaites doivent venir à eux comme aux plus prochains hoirs. Et s'ils le laissent tant que le vingt et unieme an soit passé ils ne devront apres estre ouys et ne pourront les saisines rappeler s'ils n'ont meu le plet dedans le vingt et unieme an poursuy ordonnément."

Terrien's commentary on this article is: "cest an est appelé l'an profitable dedans lequel on peut rappeler par voye possessoire les saisines de ses predecesseurs." Laurent Carey, in his essay on the Institution, Laws, and Customs of the Island of Guernsey, ed. 1889, p. 172, after stating the rule, adds: "Mais ils pourront être reçus à intenter leur action par voie propriétaire

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pour recouvrer leur héritage comme aussi ils pourront poursuivre la cassation des contrats par eux faits ou par leurs tuteurs durant leur minorité."

Their Lordships are of opinion that the rule applies only to the class of actions called "actions possessoires," the object of which is to recover possession or "rappeller les saisines" of which the plaintiff has been unjustly deprived, and it has nothing to do with petitory or real actions in which the title is in issue, such as the present one. Possessory actions require to be brought within a year and a day of the alleged disseisin or dispossession, and possession for a year and a day is, therefore, a defence in in such an action. If the respondents were right, an infant would be placed in a worse position than a person of full age as regards the assertion of his title to land, and instead of the rule being for the better protection of the minor it would be to his detriment.

Their Lordships have no statement of the grounds on which the Royal Court of Guernsey decided against the appellant. But the case was very fully argued before them, and no doubt the arguments which found favour in the Court below were also presented to their Lordships.

They have, however, failed to find any legal principle in the law of the island relating to real property upon which the judgment of the Royal Court can be supported; and they must, therefore, humbly advise His Majesty that the judgment appealed from be reversed, and instead thereof it be declared that the tunnel under the Moie du Creux mentioned in the cause is the private property of the appellant and that the public has no right of way through it, and that the costs in both Courts below ought to be paid by the respondents. The respondents must also pay the costs of this appeal.

Solicitor for appellant: *G. Bodman.*

Solicitors for respondents: *Nisbet, Daw & Nisbet.*

[PRIVY COUNCIL.]

BANK OF NEW SOUTH WALES . . DEFENDANTS;

AND

GOULBURN VALLEY BUTTER COMPANY PROPRIETARY, LIMITED . . } PLAINTIFFS.

J. C.*
1902
June 5, 6; *July* 9.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Banker and Customer—Transfer of Money from Company's Account to its Managing Director's overdrawn Private Account—Rights of Banker.

In an action by a company to recover from its bankers moneys which, standing to the credit of its account, had been transferred by cheques of its managing director to the credit of his own overdrawn private account with the same bankers:—

Held, that the bank, acting in good faith and without notice of any irregularity, was not bound before honouring the cheques to inquire into the state of the account between the company and its managing director.

APPEAL from an order of the Full Court (Oct. 11, 1900) partly reversing an order of Hodges J. (June 4, 1900) and directing that judgment be entered for the respondents in respect of three sums, 1022*l.*, 668*l.*, and 619*l.* 2*s.* 10*d.*, making in all 2309*l.* 2*s.* 10*d.*

The action was brought by the respondent company, in liquidation, to recover these amounts under the circumstances stated in their Lordships' judgment. The respondents' case originally was that these sums were paid to the bank by Ballantyne, their managing director, in breach of his duty to the company, and for the purpose of discharging his own indebtedness to the bank, and that the bank had notice thereof. Ultimately it was contended that the transactions in question were ultra vires of the company, and the case was argued in both Courts below on that footing.

The primary judge dismissed the action, finding as a fact that the bank had throughout acted in good faith and without notice of any irregularity or breach of trust on the part of

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

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Ballantyne, and holding that the arrangements and transactions complained of were legitimate on the part of the company and not ultra vires.

The Full Court, on the other hand, while accepting the finding of the primary judge as to the good faith of the bank, drew the inference from the evidence that the company's account was really opened for the benefit of Ballantyne personally, and that the transactions which in fact took place were also ultra vires.

Haldane, K.C., E. F. Mitchell, and *J. K. Young,* for the appellants, contended that on the evidence and under all the circumstances it was established that the bank received each of the three sums sought to be recovered, and credited them to Ballantyne's private account in good faith and without notice of any irregularity or breach of trust on the part of Ballantyne. The cheques were honoured by the transfer of moneys from the credit of one account to the credit of another in the ordinary course of business. There was nothing in the transactions between Ballantyne and the bank which made it the duty of the bank to inquire into the state of accounts between Ballantyne and his company. In the ordinary course of their business there would be cross-accounts between them, and moneys owing sometimes by one and sometimes by the other. It was proved that the bank acted in good faith and honestly, and there was no case made for the company to entitle them to recover back the moneys which had been withdrawn from their account by their managing director acting, so far as the bank knew or had means or duty of ascertaining, in the ordinary discharge of his duties. Reference was made to *Gray* v. *Johnston* (1) to the effect that under the circumstances of this case the bank must be shewn to be cognizant of an intended fraud; *Thomson* v. *Clydesdale Bank* (2); *Martin* v. *Rocke, Eyton & Co.* (3); *Ex parte Kingston, In re Gross.* (4)

Cohen, K.C., and *Montague Lush, K.C.,* contended that the evidence shewed that the private debts of Ballantyne had been

(1) (1868) L. R. 3 H. L. 1.
(2) [1893] A. C. 282, 292.
(3) (1885) 53 L. T. (N.S.) 946.
(4) (1871) L. R. 6 Ch. 632.

paid out of the moneys of the company. In doing so Ballantyne committed breaches of trust as director. The bank knew, or ought to have known from the conversations and arrangements made, that Ballantyne was acting wrongfully and had no right to deal with the company's money for his own purposes. The bank was accordingly party to the breach of trust, and liable to repay the moneys which it had so obtained. The transaction cannot be said to have been in the ordinary course of business. Reference was made to *Cartmell's Case*. (1)

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from an order of the Full Court of the Supreme Court of the State of Victoria, dated October 11, 1900, reversing the judgment of the primary judge (Hodges J.) of the previous June 4 in an action in which the respondent company was plaintiff, and the appellant, the Bank of New South Wales, was defendant. The object of the action (so far as material) was to recover from the bank three sums of 1022*l*., 668*l*., and 619*l*. 2*s*. 10*d*., which it was alleged had been improperly transferred from the respondent company's account at the bank to the account of one Alexander Lindsay Ballantyne, and so lost to the company.

The company was incorporated in October, 1895, under the Companies Act, 1890, of the State of Victoria, with a capital of 1200*l*. divided into forty-eight shares. The principal object of the company was to carry on the business of a creamery and butter factory, and deal in butter and other similar products, and it was empowered by its memorandum of association to carry on its business either singly or in connection with any other corporation, companies, firms, or persons. The articles provided for the appointment of a managing director, and the directors were empowered to delegate to the managing director for the time being such of their powers and authorities as the directors should think fit.

In and for some years prior to June, 1898, Alexander Lindsay

(1) (1874) L. R. 9 Ch. 691.

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Ballantyne was carrying on business in Melbourne as a dairy-farm produce merchant, and kept his banking account at the Flinders Street branch of the appellant bank. He was apparently in good credit, and had been allowed to overdraw his account from time to time to the extent of about 4000*l.* against the security of bills for collection and boxes of butter.

In the month of May, 1898, Ballantyne arranged for the purchase of all the shares in the company with a view to the amalgamation of his own and the company's businesses. This arrangement was effected by two documents both dated June 3, 1898, and pursuant thereto all the shares were transferred to Ballantyne or his nominees, and Ballantyne and two of his nominees were elected directors. Ballantyne was elected chairman of the board, and on June 6, 1898, he was appointed managing director of the company.

Ballantyne informed Mr. Earle, the manager of the Flinders Street branch of the bank, of his purchase of the shares. And on some day between May 31 and June 9 he called on Earle. What then took place is thus stated by Earle, whom the Courts below treated as an honest and credible witness:—

"He asked me if I had any objection to his bringing the account of the Goulburn Valley Butter Company from the Royal Bank to my bank. I said that I had no objection, and asked him if he was going to close up his own account. He said that he was not going to close it up, and I asked him why he did not keep one account for the whole business. He said that he wished to keep his old connection together, and thought that some of his old customers would deal with A. L. Ballantyne, but would not deal with the Goulburn Valley Butter Company, and for that reason he would buy produce from his old customers in the name of A. L. Ballantyne and pay them with A. L. Ballantyne's cheque, but that the goods so bought would go into the Goulburn Valley Butter Company's works to be made up by them, sold by the company, and the proceeds of the sale paid into the company's account, and therefore the two accounts would require to be adjusted, and for that purpose he said that he would leave me two cheques signed in blank—one by the Goulburn Valley Butter Company

and one by himself—and I was to use these cheques as I thought fit for adjustment purposes."

Ballantyne's account of the interview was as follows:—

"(*Q.*) Anything else done the same day?—(*A.*) I said to Mr. Earle that as I had undertaken to pay the company's debts—about 900*l.*, roughly speaking—within a fortnight, my account might be overdrawn, and that I would give him the company's cheque to hold in blank, and one of my own cheques to adjust from time to time as occasion might arise. The company had not any assets, and were not able to pay the liabilities as they became due.

"(*Q.*) Was anything said about goods?—(*A.*) I said I would be supplying the company with goods myself during the whole of June, and that would be a reason for my account being bigger.

"(*Q.*) Did you explain to him what goods?—(*A.*) I told him I was going to amalgamate the two businesses together, and that with the idea of holding the goodwill of both my own business and the company's business I would draw cheques on both accounts—eventually I purposed trading under the name of the Goulburn Company altogether, so as to retain all the business I could."

On June 9 an account was opened in the name of the company at the Flinders Street branch of the bank, and two cheques, one signed by Ballantyne personally and one signed by him as managing director for the company, but both undated and blank in amount, were handed to Earle. At this date Ballantyne's account was overdrawn to the extent of 667*l.* 15*s.* against security. Some point was made of this in the Court below, but their Lordships do not attach any importance to it, because it is clear that, applying the principle of *Clayton's Case* (1), the balance to his debit had run off before September 5. Between June 9 and September 5 both accounts were operated on by payment in of sums to credit and the drawing of cheques upon them.

On September 5, 1898, Ballantyne's account was overdrawn to the extent of 1354*l.* 15*s.* 10*d.* against security amounting to

(1) (1816) 1 Mer. 575; 15 R. R. 161.

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335*l.*, shewing a net debit of 1019*l.* 15*s.* 10*d.*, while the company's account was in credit to the extent of 430*l.* 1*s.* 7*d.*, and security was held by the bank amounting to 652*l.*, shewing a net credit of 1082*l.* 1*s.* 7*d.* On that date Ballantyne called at the bank, and Earle mentioned to him the state of the accounts. Ballantyne then suggested that the accounts should be adjusted by making a transfer from the company's account, and by his direction the company's blank cheque was filled up with the sum of 1022*l.* and dated September 5, 1898, and it was initialled by Ballantyne. The amount of the cheque was on the same day debited to the company and credited to Ballantyne's account. This is the first sum claimed in the action.

On September 30, 1898, a similar transaction took place. Another blank cheque of the company which had been given to Earle in place of the previous one was filled up by Ballantyne's directions with the sum of 668*l.* and initialled by him. The amount was credited to Ballantyne's account, which was then overdrawn to the amount of 667*l.* 4*s.* 1*d.* This is the second amount in question.

On November 5, 1898, a cheque of that date of the company for 619*l.* 2*s.* 10*d.* was paid over the counter to the credit of Ballantyne's account in the ordinary way. At that date Ballantyne's account was overdrawn to the extent of 619*l.* 2*s.* 10*d.* against security amounting to 228*l.* This is the third and last sum claimed.

To complete the story, it appears that on November 25, 1898, Ballantyne's account was in credit and the company's account was overdrawn. Earle, without any communication with Ballantyne, filled up his blank cheque in favour of the company with the amount of 231*l.* 2*s.* 1*d.* and placed it to the credit of the company's account. This has not been objected to.

On January 18, 1899, the company went into liquidation, and in the following March Ballantyne's estate was placed under sequestration. Earle stated in his evidence that he had no suspicion of Ballantyne's financial difficulties until December, 1898, and no attempt was made to fix him with earlier notice.

It should be mentioned, as the Court below attached some importance to it, that in July, 1898, Ballantyne sold four of the

company's shares to a Mr. Stone and another share to a Mr. Shingler, who continued to hold them until the liquidation. In the view which their Lordships take of the transactions this circumstance does not, however, appear to them material.

The respondent's case as originally pleaded was in effect that the above-mentioned sums were paid to the appellant bank in breach of Ballantyne's duty as managing director for the purpose of discharging his private indebtedness to the bank, and that the bank had notice thereof; but in the course of the trial the respondent obtained leave to amend, and set up the case that the transactions in question were ultra vires of the company. The primary judge found that the bank had acted in good faith and without notice of any irregularity and breach of trust on the part of Ballantyne, and that the transactions were not ultra vires of the company. The Full Court held that the transaction entered into if carried out would have been ultra vires, and that it was ultra vires as carried out whatever agreement was entered into.

It is a little difficult to see what it exactly was that is said to have been ultra vires of the company. Ballantyne's proposal to work his own business in connection with that of the company as disclosed by him to Earle was certainly not ultra vires. Nor was the giving of blank cheques for the purpose of adjusting the two banking accounts in itself ultra vires. It is not a prudent or very businesslike act of a manager of a company or anybody else to entrust another with a blank cheque, but no liability is incurred until the cheque is made use of, and the fact and extent of liability will then depend on the circumstances of the case. If Earle had taken upon himself to fill up a blank cheque on the company's account, he would very likely have imposed upon the bank the obligation of shewing that the company was at that date indebted to Ballantyne in the amount. But he did not do this. Both on September 5 and on September 30 the cheque was filled up under Ballantyne's direction, and with an amount authorized by him on behalf of the company. The transaction, therefore, was precisely the same as if the company's cheque for the amount in favour of

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Ballantyne had been handed to the bank with directions to place the amount to Ballantyne's account. This was in fact the form of the third transaction in question.

The learned counsel for the respondent admitted that, if Ballantyne was indebted to the company at the respective dates of the three cheques in the amounts for which they were drawn, no question could be raised. The question, therefore, is narrowed to this: whether there was any duty on the part of the bank or its manager to inquire into the state of the account between Ballantyne and the company. There is no evidence that Earle knew that the company was not indebted to Ballantyne, or that the latter was not justified in filling up the cheques for the amounts they bear, and Earle states in his evidence that his belief was that any transfer Ballantyne made was simply transferring money that the company was owing to him. The course of business as described to Earle would necessarily result in cross-accounts between Ballantyne and the company, and probably in the latter becoming indebted to Ballantyne, and indeed there would be no objection in the company making advances to Ballantyne to enable him to meet his engagements for butter on their account. The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque (*Gray* v. *Johnston* (1); *Thomson* v. *Clydesdale Bank* (2)), and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia* v. *Murray-Aynsley*. (3) On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Ex parte Kingston, In re Gross*. (4) Their Lordships are of opinion that Earle was not bound to inquire into the state of the account between the parties. He had no materials to enable him to do so, and it is difficult to suggest any one of whom he could have made inquiry other than Ballantyne himself. Their Lordships, therefore, hold that the

(1) L. R. 3 H. L. 1.
(2) [1893] A. C. 282.
(3) [1898] A. C. 693.
(4) L. R. 6 Ch. 632.

bank is not affected with notice of any irregularity on Ballantyne's part.

The learned Chief Justice seems to have thought that there was some agreement and intention on the part of Earle and Ballantyne to discharge the latter's previous indebtedness to the bank out of the company's money. Questions were also put to Earle in his cross-examination as to his view of the propriety of the transactions in other circumstances. It is possible that Earle was imperfectly acquainted with the law relating to joint stock companies, and that he placed some and perhaps undue reliance on the fact of Ballantyne being sole owner of the shares. But the bank is bound only by Earle's acts and knowledge, and not by his opinions on legal questions. In their Lordships' judgment the evidence does not warrant the inference of an agreement between Earle and Ballantyne to discharge the latter's private debts out of the company's money, and the cheques were not in fact applied (as assumed by the Chief Justice) in discharge of Ballantyne's indebtedness existing on June 9.

Their Lordships will humbly advise His Majesty that the order of the Full Court of October 11, 1900, should be discharged, and there should be substituted for it an order dismissing the respondent's appeal to the Full Court with costs. The respondent will also pay the costs of this appeal

Solicitors for appellants: *Wadeson & Malleson.*
Solicitors for respondent: *Flegg & Son.*

[PRIVY COUNCIL.]

J. C.* 1902 June 3, 4; July 9.

PAYNE AND OTHERS . . . . . SUPPLIANTS;

AND

THE KING . . . . . RESPONDENT.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Administration and Probate Act, 1890, *s.* 115—*Construction—Intent to evade—Specialty Debt in New South Wales liable to Duty in Victoria.*

Sect. 115 of the Administration and Probate Act of Victoria, 1890, which enacts that transfers made with intent to evade payment of duty extends to and strikes at colourable transactions only.

Simms v. *Registrar of Probates*, [1900] A. C. 323, followed.

If the transfer is complete, a manifest desire on the part of the transferor to avoid liability to duty is not sufficient to prove an intent to evade payment within the meaning of the enactment.

A debt which though a specialty debt in New South Wales is a simple contract debt in Victoria, where both testator and debtor resided and were domiciled, is an asset in Victoria, recoverable under a Victorian probate, and liable to duty in Victoria.

CROSS-APPEALS from a judgment of the Full Court (May 1, 1901) reversing a judgment of Madden C.J. (Dec. 5, 1900).

The questions decided are with reference to the liability of the appellants, as executors of the late Thomas Budds Payne of Melbourne, to pay probate duty upon three sums of 45,771*l.* 3*s.* 2*d.*, 75,123*l.* 4*s.* 3*d.*, and 63,025*l.* 17*s.* 9*d.* The said sums were included in the amount on which duty was paid by the appellants on obtaining probate, and the judgments under appeal were given in proceedings commenced by petition of right, in which they sought to recover back so much duty as had been paid in respect thereof.

These three sums were secured by three statutory mortgages of land in New South Wales. With regard to the first two of

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

them, the question in dispute was whether or not the sums of money represented by those mortgages which were admittedly transferred without consideration by the testator to the appellant John Frederick William Payne prior to the making of the mortgages were (as contended for the Crown) transferred "with intent to evade the payment of duty" within the meaning of s. 115 of the Administration and Probate Act of Victoria, 1890 (No. 1060). With regard to the third sum, the question in dispute was whether or not the principal sum secured by the mortgage and the interest thereon were at the date of the death of the testator assets in Victoria so as to render them liable to probate duty there.

Madden C.J. entered judgment for the appellants in reference to the first question in dispute on the ground that the gifts of money representing the moneys lent in the first two mortgages were gifts bonâ fide made to the appellant John Frederick William Payne, and not gifts made with intent to evade the payment of duty. He entered judgment for the Crown in reference to the third mortgage upon the ground that the mortgage was a simple contract debt, and therefore situated for probate purposes where the debtor was. Upon appeal, the Full Court reversed the decision of Madden C.J. on both points.

E. F. Mitchell and *J. H. Williams*, for the appellants, contended that the judgment appealed from was wrong in directing duty to be paid on the first two mortgages. The evidence proved, and the first Court was right in finding, that the moneys secured by those mortgages were bonâ fide absolute gifts by the testator, and consequently they did not come within the provisions of s. 115 of the Act of 1890. The Full Court ought not to have held, under the circumstances proved, that they were made "with intent to evade the payment of duty" within the meaning of that section. That section only applies where such gifts are made with intent to evade the payment of duties imposed by the Act of 1890. Reference was made to *Simms* v. *Registrar of Probates* (1); *Bullivant* v.

(1) [1900] A. C. 323.

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Attorney-General of Victoria (1); *Finlay* v. *Reg.* (2) The Court below did not distinguish between a desire to evade liability and an intent to evade payment. They held that if the inducement to give was the desire to get rid of liability to probate duty the gift was void. It followed that, if a gift had once been made with that desire and the donee had spent or otherwise lost it, so that at the time of the testator's death it had ceased to exist, duty would still be payable. No such intention should be imputed to the Legislature, which struck at colourable transactions only, and did not affect real and operative transactions by testator all his life on the ground that the apparent motive for them was sufficient to render them null and void.

Haldane, K.C., and *Rowlatt*, for the respondent, contended that the evidence shewed that the sums represented by the first two mortgages were never really given away by the testator. They were merely transfered to Payne to be invested in his name in the course of his management of the testator's affairs. The circumstances rebutted any presumption that they were transferred by way of advancement, and shewed that they were transferred "with intent to evade the payment of duty" within the meaning of s. 115. In cross-appeal they contended that in regard to the third statutory mortgage the debt was a simple contract debt, and was for probate purposes situated where the debtor was. The true view of the facts was that the testator and his mortgagor were both domiciled in Victoria. The mortgage, no doubt, was over lands in New South Wales; and the instrument of mortgage was in form authorized by the Real Property Act of New South Wales (26 Vict. No. 9). By this instrument, which was not under seal, the mortgagee covenanted to pay to the testator's account at the Bank of Victoria in Melbourne the sum of 63,000*l.*, and interest quarterly in the same manner. The principal sum was not due at the testator's death, and the instrument of mortgage was in Victoria at that date. Under these circumstances the executors could have sued for and recovered the debt in Victoria by virtue of the Victorian probate. The debt

(1) [1901] A. C. 196. (2) (1899) 15 Vict. L. R. 212.

was made payable in Melbourne, and the circumstance that it was secured on land outside Victoria was immaterial. Reference was made to *Attorney-General* v. *Bouwens* (1); *Commissioner of Stamps* v. *Hope* (2); *Walsh* v. *Reg.* (3); *Henty* v. *Reg.* (4); *Blackwood* v. *Reg.* (5)

E. F. Mitchell, and *J. H. Williams*, for respondents in cross-appeal, contended that the Full Court was right in holding that duty was not payable on the third mortgage in question, because the Victorian probate would not enable the executors to deal with it. That was the test established by *Blackwood* v. *Reg.* (5) This property was governed by a special Act of New South Wales (26 Vict. No. 9), and the grant of probate in New South Wales was necessary to enable the executors to deal with it. *Commissioner of Stamps* v. *Hope* (2), which was a case not under the Real Property Act, but under the Crown Leaseholds Act, did not establish that the locality of a special debt was the only test to be applied, and was not applicable to this debt. The property was an asset of the testator within the Colony of New South Wales, and not within the Colony of Victoria. Under s. 35 of 26 Vict. No. 9, this mortgage debt was a specialty debt locally situated in New South Wales at the time of the testator's death: see *In the Will of Currie* (6); *Laidlay* v. *The Lord Advocate* (7); *Attorney-General* v. *Dimond* (8); *Attorney-General* v. *Hope* (9); *Attorney-General* v. *Bouwens* (1); *Ex parte Horne* (10); *Attorney-General* v. *Higgins* (11); *Power* v. *Reg.* (12); *Harding* v. *Commissioner of Stamps for Queensland.* (13)

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellants, who are also respondents in the cross-appeal, are the executors of the will of the

(1) (1838) 4 M. & W. 171; 51 R. R. 517.
(2) [1891] A. C. 476, 481.
(3) [1894] A. C. 144.
(4) [1896] A. C. 567.
(5) (1882) 8 App. Cas. 82.
(6) (1899) 25 Vict. L. R. 224.
(7) (1890) 15 App. Cas. 489.
(8) (1831) 1 C. & J. 356; 35 R. R. 732.
(9) (1834) 1 C. M. & R. 530; 37 R. R. 29.
(10) (1828) 7 B. & C. 632.
(11) (1857) 2 H. & N. 339.
(12) (1886) 12 Vict. L. R. 50.
(13) [1898] A. C. 769.

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late Thomas Budds Payne, a gentleman of great wealth, who died on August 27, 1897, domiciled in Victoria at the time of his death.

The proceedings out of which the appeal and cross-appeal arose were commenced by a petition of right, whereby the executors sought to recover back probate duty paid in respect of three several sums of 45,000*l.*, 75,000*l.*, and 63,000*l.*, and the interest accrued on those sums respectively, at the time of the testator's death. The three principal sums were secured by three statutory mortgages of land in New South Wales, which are referred to in the proceedings as Kiddle's mortgage, McVean's mortgage, and McCulloch's mortgage.

The sum of 45,000*l.* secured by Kiddle's mortgage and the greater part of the sum of 75,000*l.* secured by McVean's mortgage were made over by the testator in the year 1896 without consideration to his eldest son, the appellant John Frederick William Payne, and both mortgages were taken in his name. The first question is, Were these transfers made "with intent to evade the payment of duty" within the meaning of s. 115 of the Administration and Probate Act of Victoria, 1890? The answer must depend on the true construction of that enactment, and on the proper inference to be drawn from the evidence as to the real nature of the transaction between father and son.

The question in controversy with regard to McCulloch's mortgage is whether or not the principal sum secured thereby, with the interest accrued at the date of the testator's death, was an asset in Victoria so as to render it liable to duty there. This question would also have to be considered in reference to Kiddle's mortgage and McVean's mortgage in the event of it being held, in accordance with a contention put forward on behalf of the respondent, that the transfers of the two sums secured thereby were merely colourable.

The case came on to be heard before Madden C.J. He decided the first question in favour of the executors, the second in favour of the Crown. On appeal the position was reversed. The Full Court determined the first question in favour of the Crown and the second in favour of the executors.

Sect. 115 of the Act of 1890 contains the following enactment:—

"If any person has made or shall hereafter make any conveyance or assignment, gift, delivery, or transfer of any estate real or personal, or of any money or securities of money, with intent to evade the payment of duty under this part of this Act, in case such person should die the property contained in any such conveyance or assignment, or the subject-matter of any such gift, delivery, or transfer, shall, upon the death of such person, be deemed to form part of his estate for the purposes of this part of this Act upon which duty shall be payable under this part of this Act, and the payment of the duty upon the value of such property may be enforced against such property in the same way that duty under this part of this Act is enforceable, and as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed, assigned, given, delivered, or transferred."

The section then goes on to deal (1.) with conveyances or assignments, gifts, deliveries, or transfers intended to take effect upon the death of the person making the same, which are to be "deemed to have been or to be made, as the case may be, with intent to evade the payment of the duty" under the Act, and (2.) with donations mortis causâ, which are "to be deemed to form part of the deceased's property for the purposes of estimating the duty."

The question of the meaning of the expression "with intent to evade the payment of duty" was discussed in the judgment of this Board delivered by Lord Hobhouse in *Simms* v. *Registrar of Probates*. (1) Although the construction of the South Australian Act which was there in question involved the consideration of points not to be found in the present case, their Lordships are of opinion that the principle of the decision must be applied, and that in conformity with that decision it must be held that the enactment contained in the earlier part of s. 115 of the Victorian Act of 1890 extends to and strikes at colourable transactions only. It will be observed that in its

(1) [1900] A. C. 323.

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terms the enactment is absolute, without limitation of time or amount. It is difficult to suppose that the Legislature could have intended that on the death of a person dying after the passing of the Act a strict account should be taken of all transfers and gifts which the deceased had ever made in the whole course of his life, being moved thereto, more or less, by the desire of avoiding payment of death duties—a motive which in conjunction with others operates frequently in the case of gifts to charitable institutions, and certainly not unfrequently in the case of gifts to near relatives.

Then comes the question, Was the transaction as regards Kiddle's mortgage and McVean's mortgage real, or only colourable? On the one hand there is the uncontradicted statement of Mr. John Frederick William Payne, who was examined and cross-examined on the subject. He seems to have given his evidence fairly and frankly. He was believed by the Chief Justice, and not disbelieved by the Court of Appeal. He declared positively that in the case of both mortgages the gift to him was an absolute gift out and out, not qualified by any reservation or trust or secret understanding of any sort or kind. On the other hand there is a circumstance which at first sight tends to create suspicion. Mr. John Frederick William Payne paid substantially the whole of the interest accruing on these mortgage debts to his father's account, and invested it, or allowed it to be invested, with his father's moneys. The learned Chief Justice thought that the peculiar position in which Mr. John Frederick William Payne was placed suggested an adequate and satisfactory explanation of his conduct. Mr. Payne, the father, had been a conveyancer. He retired from the profession, but still kept his office in Melbourne, and there he devoted his time and talents to the accumulation of money by prudent investments. Mr. John Frederick William Payne also began life as a conveyancer, but about twenty years ago, at his father's instance, he too gave up his profession. He was unmarried. He went to live in his father's house and assisted his father in the management of his business. He received no salary for his services, but he had the advantage of living in his father's house. There he had all he wanted. He had

some means of his own, and from time to time he received presents from his father. He had no expensive tastes: his personal expenditure was not more than 300*l.* or 400*l.* a year. Then the intended disposition of his father's estate was no secret. There were three sons. They were to be residuary legatees in equal shares, and they were to bring into hotchpot all capital sums received from their father during his life. The gifts to Mr. John Frederick William Payne, large as they seem, were far short of his expectations under the will. The object of these gifts was, as he says, to accustom him to the management of business and the responsibilities of property, and to make him feel independent of his father, and, possibly, he thinks, to induce him to marry. A younger brother who was married at the time had been advanced on his marriage. In these circumstances it does not seem so very extraordinary that the father should make large advances to his eldest son, and that the son, instead of hoarding the interest (which might have given rise to jealousy and illwill), should throw the income which he did not care to spend into a common fund, investing it with his father's moneys for the ultimate benefit of himself and his brothers. Mr. Payne, the father, had such command of money and such skill in dealing with it that probably the son lost little or nothing by not keeping his own money in his own hands. On the whole their Lordships see no reason to dissent from the conclusion at which the Chief Justice arrived. The judgment of the Full Court was based on a view which their Lordships cannot accept. They thought that there could be no "reasonable motive" for making the gifts in question, unless it were found in the intent to evade payment of duty. "The motive for saving probate duty," they say, "reconciles with reason what would otherwise appear to be useless proceedings." Though the gift might be a perfected gift and the conveyance might fulfil all legal requisites, a manifest desire on the part of the donor to avoid payment of duty was in their opinion enough to prove an intent to evade payment of duty within the meaning of the enactment.

There remains the question as to McCulloch's mortgage. That was the testator's property at the time of his death. The

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debtor as well as the testator resided in Victoria and was domiciled there. The debt, though a specialty debt in New South Wales, was a simple contract debt in Victoria. That being so, it seems to their Lordships that the Chief Justice and Hood J., who dissented on this point from his colleagues, were right in holding that the debt was an asset in Victoria and recoverable under a Victorian probate, although it may well be that in order to discharge the mortgage probate duty would also have to be paid in New South Wales, and the debt, if recovered in Victoria, might be retained in Court until the mortgagees were in a position to discharge the mortgage. This result seems to their Lordships consistent with the practice as established in England, and their Lordships see no reason why a similar rule of practice should not be held to apply in an analogous case in the States of the Australian Commonwealth.

Their Lordships will, therefore, humbly advise His Majesty that the order of the Full Court should be discharged, each party paying his own costs of the appeals thereto, and the order of the Chief Justice restored.

As the appellants have succeeded in their appeal, and the respondent is successful in the cross-appeal, there will be no order as to costs here.

Solicitors for appellants: *Burton, Yeates & Hart.*
Solicitors for respondent: *Freshfields.*

[PRIVY COUNCIL.]

PONAMMA . . . . . PLAINTIFF;

AND

ARUMOGAM AND OTHERS . . . . . DEFENDANTS.

Ex parte PONAMMA.

J. C.*
1902
July 26.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Practice—Special Leave—Appeal in Formâ Pauperis.

Where a Colonial Code made no provision for appeals in formâ pauperis, and it was contended that the case was as regards amount, value, and nature fit to be taken in appeal, special leave was under the circumstances of the case granted.

THIS was a petition for special leave to appeal in formâ pauperis from a decree of the Supreme Court (Jan. 4, 1900) reversing a decree of the District Court of Badulla.

It stated that the petitioner's father died intestate in 1884 possessed of certain plots of land and other property in the Badulla district; that thereupon Arumogam (the petitioner's brother) and their mother, without having taken out administration to his estate, divided it between some of his children, including the petitioner, without the petitioner's consent and during her minority; that in 1898, seven years after attaining her majority, she sued for partition of the deceased's estate among his heirs under the Partition Ordinance 10 of 1863; and that four of the defendants consented to the prayer of the plaint, while the remainder resisted. It further stated that the District Judge decreed a partition as prayed, assigning to the petitioner one-fourteenth share, the total value of the estate being Rs.8000; and that the Supreme Court, on the appeal of the contesting defendants, set aside this order and dismissed the petitioner's suit on the ground, as appeared from their recited judgment, that the division effected at the time was fair and equitable and in accordance with the wishes of the

* *Present:* LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR JOHN BONSER.

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PONAMMA v. ARUMOGAM. PONAMMA, *Ex parte.*

deceased, and that it would be unfair to disturb it having regard to the lapse of time. The petition further alleged the pauperism of the petitioner.

R. W. Lee, and *F. H. M. Corbet*, for the petitioner, contended that, as the Ceylon Civil Procedure Code (Ordinance 2 of 1889) made no provision for appeals in formâ pauperis, the Supreme Court had no jurisdiction to admit an appeal as now prayed, and that this application was the only alternative. The case was as regards amount, value, and nature fit for appeal. The petitioner had a legal right to the due administration of the estate, and that had been refused. The Courts Ordinance (1 of 1889) prescribed a minimum appealable amount of Rs.5000. The total value of the estate to be partitioned exceeded this amount. Regard must be had to the total value, and not to the value of the petitioner's fractional share: *Ameena Khatoor* v. *Radhabenod Misser*. (1)

THEIR LORDSHIPS granted leave to appeal in formâ pauperis.

Solicitor for petitioner: *J. J. Freeman.*

(1) (1859) 7 Moo. I. A. 262; S.C. 12 Moo. P. C. 470.

[PRIVY COUNCIL.]

COMMISSIONER OF TRADE AND CUSTOMS . . . . . } DEFENDANT;

AND

R. BELL & CO., LIMITED . . . . PLAINTIFFS.

J. C.* 1902 April 16; July 23.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Patents, Designs, and Trade Marks Act, 1889, *ss.* 89, 104—*Construction—Forfeiture of Prohibited Goods by Innocent Holder.*

Matchboxes, belonging to the respondents, stamped "New Zealand" but filled with London matches, thus bearing a false trade description, were seized on arrival in New Zealand as contraband. It was conceded that there was no fraudulent intention, or any intention to transgress the law of the Colony.

In an action against the appellant contesting the legality of the seizure:—

Held, that under ss. 89 and 104 of the New Zealand Patents, Designs, and Trade Marks Act, 1889, reproducing the Imperial Merchandise Marks Act, 1887, ss. 2, 16, the seizure must be upheld as of goods whose importation was prohibited. The only remedy was under s. 267 of the Customs Laws Consolidation Act, 1882, by means of an application to the Governor.

APPEAL from a judgment of the Court of Appeal (July 1, 1901) affirming a judgment of Edwards J. (April 19, 1901) declaring that 393 cases of wax vestas seized and detained by the appellant were not liable to forfeiture.

These wax vestas were seized and detained by the Customs authorities of New Zealand as goods prohibited to be imported into New Zealand, and liable to forfeiture there by virtue of the provisions of the New Zealand Patents, Designs, and Trade Marks Act (No. 12 of 1889), and the New Zealand Customs Laws Consolidation Act, 1882 (No. 55).

The respondents carried on an extensive business in the manufacture of matches. They had a factory in London since 1832, and since 1894 they had factories at Wellington in New Zealand and Melbourne in Victoria. Prior to the establishment of the Wellington factory the matches sold in New

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

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Zealand were made in London, and had the word "London" on the boxes. Subsequent to that establishment no boxes were manufactured in New Zealand till after 1899, and then not in sufficient numbers. In consequence New Zealand matches were packed and sold in London boxes. Both Courts found that they bore a false trade description, but that the respondents had acted innocently.

Edwards J. held that the words "New Zealand" as used upon the forfeited boxes amounted to a "false trade description" within the meaning of ss. 89 and 90 of the Act of 1889; but he further held that, reading ss. 104 and 89 together, in a case of goods (not being foreign goods) arising under s. 104, the defences provided by s. 89, sub-s. 2 (*a*), (*b*), and (*c*), are open to the owner of the goods, and that, this being so, the respondent company had acted innocently within the meaning of s. 89, sub-s. 2 (*c*), and were, therefore, not guilty of an offence under the Act, and accordingly that the goods were not liable to be forfeited under s. 104.

The Court of Appeal affirmed this judgment on the ground that before the right to forfeiture arises the owner of the goods is permitted to shew that he acted innocently, and that the question whether the goods are liable to forfeiture must be dealt with as if the proceeding were an indictment of the owners under s. 89.

Haldane, K.C., and *G. Lawrence* contended that, on the true construction of s. 104 of the Act of 1889, the goods in question were thereby prohibited to be imported into the Colony. They were thereby made subject to s. 66 of the Act of 1882, and were rightly seized thereunder. Sects. 89 and 90 of the Act of 1889 are only imported into s. 104 for the purpose of defining the character of goods liable to be forfeited. Sect. 104, as appears from its recital, is directed to making further provision for prohibiting the importation of offending goods. Its true effect is to enable the appellant to seize and forfeit at the door of the Customs goods which bear a false trade description. The object is to prevent their circulation in the Colony. None of the defences, such as that of acting innocently, available to the

owners under an indictment under s. 89, sub-ss. 1 or 2, are open in the case of a seizure under s. 104.

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Fletcher Moulton K.C., and *Sebastian* contended that the goods were not liable to forfeiture under s. 104. The section is by its true construction controlled by its preamble. To render goods liable to forfeiture under this section, it must be shewn that if sold they would be liable to forfeiture under the Act. These goods, having regard to all the sections already cited, would not have been liable to forfeiture under the Act unless the respondents or their agents in Wellington were unable to prove that they had acted innocently and without intention to defraud. In this case their innocence had been proved and concurrently found by the Courts below. There was no evidence that the goods if and when sold would have been sold in the offending boxes. If sold they would not have been liable to forfeiture, and therefore were not liable under s. 104.

Lawrence replied.

1902 *July* 23.

The judgment of their Lordships was delivered by

SIR FORD NORTH. The respondents carry on the business of manufacturers of matches in New Zealand, and also in London. In London they make matchboxes as well as matches, and as occasion requires they send over empty matchboxes stamped with the words "New Zealand" for use in their Colonial business.

In 1900 several packages of matchboxes consigned by the respondents to their agents in New Zealand were seized on arrival by the officers of Customs as contraband. The boxes were stamped "New Zealand," but filled with London matches. It is not disputed that, having regard to their contents, these boxes bore a false trade description. On the other hand, it is conceded that neither the respondents nor their agents or servants had any fraudulent intention, or any intention of transgressing the law of the Colony. The mistake was the work of a subordinate in the packing department of the London factory, who acted in the matter without instructions from his superiors and merely with a view of economising space in transit.

The respondents, as they were entitled to do, challenged the

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legality of the seizure by bringing an action against the appellant, the Commissioner of Trade and Customs. And so far they had been successful in the contest. The judge of first instance, holding that the respondents "had acted innocently," made a declaration that the goods seized were not liable to forfeiture. The Court of Appeal, by a majority of four to one, has affirmed the order.

The question depends upon the true construction of Part IV. of the Patents, Designs, and Trade Marks Act, 1889, which reproduces the provisions of the Imperial statute known as the Merchandise Marks Act, 1887.

The most important sections in the Colonial Act are ss. 89 and 104, corresponding with ss. 2 and 16 of the Imperial Act.

Sub-s. 1 of s. 89 deals with the forgery of trade-marks and the application to goods of any false trade description. It declares that, subject to the provisions of the Act, an offence against the Act is committed by such forgery or application unless the party charged "proves that he acted without intention to defraud." Sub-s. 2 enacts that every person who sells any goods to which any false trade description is applied is guilty of an offence against the Act unless he proves (*a*) that, "having taken all reasonable precautions against committing an offence" against the Act, he had no reason to suspect the genuineness of the trade description, and (*b*) that on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods, or (*c*) "that otherwise he had acted innocently." Sub-s. 3 enacts that every person guilty of an offence against this part of the Act is liable on conviction to imprisonment or fine or to both, and "in any case to forfeit to Her Majesty every chattel, article, instrument or thing by means of or in relation to which the offence has been committed."

Sect. 104, so far as material, is in the following terms:—

"104. Whereas it is expedient to make further provision for prohibiting the importation of goods which if sold would be liable to forfeiture under this part of the Act—

"Be it therefore enacted as follows:

"(1.) All such goods" [and also all foreign goods bearing

the name or trade-mark of a British trader unless accompanied by a definite indication of origin] "are hereby prohibited to be imported into the Colony, and subject to the provisions of this section shall be included among goods prohibited to be imported as if they were specified in s. 66 of the Customs Laws Consolidation Act, 1882." . . . .

"(8.) This section shall have effect as if it were part of the Customs Laws Consolidation Act, 1882."

The Act of 1882 authorizes the seizure and forfeiture of all goods the importation of which is prohibited by law.

The contention of the respondents throughout has been that their innocence protects their goods. The argument is that no goods are liable to forfeiture unless an offence against the Act has been committed, and that there can be no offence against the Act where the party charged is in a position to prove that he has "acted innocently."

Their Lordships do not stop to inquire whether in a case like the present, where the false trade description is stamped on the goods or the boxes containing the goods, it is competent for the party charged to give the go-by to the specific requirements of (*a*) and (*b*), and to shelter himself under the looser and more general language of (*c*), or whether, as seems to have been held in *Coppen* v. *Moore* (1)—a case of great importance and no little authority—the person charged can only resort to (*c*) when the false trade description is not affixed to the goods themselves, but has been used upon the occasion and as part of the terms of sale. Whatever may be the true view on this point, their Lordships assume for the purposes of this judgment that, if the goods in question in the present case had been sold on arrival, the respondents could not have been convicted of an offence against the Act.

What, then, is the meaning of s. 104? It is certainly awkwardly expressed. It follows the language of s. 89, but not so closely as necessarily to confine prohibition to the case in which liability to forfeiture is declared in the earlier section. There is at any rate one difference between the two sections not without significance. Sect. 104 deals with things, not

(1) [1898] 2 Q. B. 306.

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with persons. It speaks of goods liable to forfeiture, not of traders liable to have their goods forfeited. Still, no doubt, on a narrow and literal construction of the words of the preamble, if the scope and object of the Act be disregarded, it is possible to arrive at the conclusion that no goods are to be treated as contraband unless an offence against the Act has been committed and has been followed by conviction. But this construction obviously makes the scheme of prohibition unworkable, and the enactment itself little better than nonsense.

It seems to their Lordships that the proper mode of dealing with the Act is to construe it—as indeed it was construed in *Coppen* v. *Moore* (1)—in accordance with the intent and meaning of the Legislature. Clearly it was the intention of the Legislature to exclude goods bearing a forged trade-mark or a false trade description as well as all foreign goods bearing the name or trade-mark of a British trader without a definite indication of origin. The latter class of goods is excluded absolutely. It seems absurd to suppose that the Legislature could have meant that the admission or exclusion of the former should depend on the state of mind of the importer. Goods bearing a forged trade-mark or a false trade description may be mischievous even in the hands of an innocent or ignorant owner. The owner's innocence cannot affect the character of the goods. It is difficult to see why it should be allowed to interfere with the policy of the Legislature.

Sect. 98, dealing with goods obnoxious to the Act where the owner is unknown or cannot be found, speaks of goods "which, if the owner thereof were convicted, would be liable to forfeiture." There the language is perfectly accurate. The passage seems to suggest what must be supplied in the preamble of s. 104. Their Lordships think that the words "goods which if sold would be liable to forfeiture" must be read as meaning "goods which if sold would be liable to forfeiture on conviction of the seller," or, what comes to the same thing, as equivalent to the expression "goods the sale of which would expose the seller to the liability of having the goods forfeited by due process of law." That gives a reasonable meaning to

(1) [1898] 2 Q. B. 306.

the words. Goods falsely marked are liable to forfeiture in a very intelligible sense. There is an inchoate liability, although the seller may escape conviction and its consequences by proving facts which the Act treats as a sufficient excuse.

The learned counsel for the respondents dwelt upon the hardship inflicted on an innocent owner by the forfeiture of valuable goods, when the mischief could be remedied so simply by emptying and refilling the boxes which have been seized as contraband. But the hardship, such as it is, is really due to the action of the respondents themselves. They have mistaken their remedy. The case seems to be met by s. 267 of the Act of 1882, which provides that, whenever any seizure is made for any offence under the Customs Acts, the Governor may direct restoration or may waive proceedings on any terms and conditions he shall think fit. Had an application been made to the Governor, supported by proper evidence, it can hardly be doubted that the goods would have been released on a proper undertaking.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the action should be dismissed with costs in the Courts below to be taxed on the same scale as the costs awarded in the Courts below were directed to be taxed.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondents: *Ingle, Holmes & Sons.*

[PRIVY COUNCIL.]

J. C.* 1902 *July* 11, 23.

DOMINION COTTON MILLS COMPANY, LIMITED, AND OTHERS . . . . } DEFENDANTS;

AND

GENERAL ENGINEERING COMPANY OF ONTARIO, LIMITED . . . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Patent Act (*R. S. O.*, *c.* 61, *s.* 8)—55 *&* 56 *Vict. c.* 24, *s.* 1—*Construction—Expiry of Patent—British Patent a Foreign Patent.*

By the true construction of s. 8 of the Canadian Patent Act, c. 61 of the Revised Statutes of Canada, as amended by Canadian Act 55 & 56 Vict. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act.

APPEAL from a judgment of the Supreme Court (Dec. 7, 1900) reversing a judgment of the Exchequer Court of Canada (May 7, 1900).

Special leave to appeal was granted on March 9, 1901, so far as such appeal might be necessary in order to determine the true construction to be placed on s. 8 of c. 61 of the Revised Statutes of Canada and s. 1 of the Act of 55 & 56 Vict. c. 24 (Canadian Statutes).

Burbidge J., in delivering the judgment of May 7, 1900, was of opinion that the British, Italian, and Canadian patents in question were for the same invention; but that the British patent expired on March 1, 1897, the Italian patent either in 1895, or at latest about March 31, 1898; that the British patent was a "foreign patent" within the meaning of that expression as used in s. 8 of the Patent Act, and that the expression in the said Act, "if a foreign patent exists," has reference to a foreign patent existing when the Canadian patent is granted, and not to one existing when the Canadian patent is applied for.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

The Supreme Court reversed this decision, holding that the governing date was that of the application for, and not that of the grant of, the Canadian patent.

Fletcher Moulton, K.C., and *Loehnis*, for the appellants, contended that, by the true interpretation of s. 8 of the Patent Act and s. 1 of 55 & 56 Vict. c. 24, the Canadian patent expired at the earliest date at which any foreign patent expired. It was immaterial when it was granted; if it existed concurrently with the Canadian patent the latter could not survive it. The British patent was foreign within the meaning of those Acts. In this case the American, Italian, and British patents existed at the date of the grant of the Canadian patent; and the American patent existed at the date of the application for the Canadian patent. So that even if the restricted interpretation of the Act by the First Court were right, the respondent must fail. Reference was made to *Dreschel* v *Auer Incandescent Light Manufacturing Co.* (1)

Blake, K.C., and *J. L. Ross*, contended that, as regards the American patent, no question could be now raised. The British and Italian patents certainly did not exist at the date of the application for the Canadian patent, nor had either of them expired within the meaning of the Acts in question. Nor was the British patent a foreign patent. And by the true construction of the two sections in question the expiration of the British patent (assuming that it was foreign and had expired) did not affect the Canadian patent. Reading the earlier and the later portions of those sections together, the foreign patent alluded to is one which is in existence at the date of the application for a Canadian patent. Reference was made to *In re Betts' Patent.* (2)]

Moulton, K.C., replied.

1902
July 23.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is simply what is the true construction of the last clause of s. 8 of the

(1) 6 Ex. C. R. 55; (1898) 28 Sup. C. R. 608.
(2) (1862) 1 Moore (N.S.) 49.

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DOMINION COTTON MILLS COMPANY v. GENERAL ENGINEERING COMPANY OF ONTARIO.

Canadian Patent Act, c. 61, of the Revised Statutes of Canada, as amended by s. 1 of the Canadian Act 55 & 56 Vict. c. 24. This Act came into operation on July 9, 1892, and applied to all Canadian patents granted after that date.

The section, as amended, is as follows:—

"8. [Any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada, may obtain a patent in Canada, if the same be applied for within one year from the date of the issue of the first foreign patent for such invention; and if within three months after the date of the issue of a foreign patent, the inventor gives notice to the Commissioner of his intention to apply for a patent in Canada for such invention, then no other person having commenced to manufacture the same device in Canada during such period of one year, shall be entitled to continue the manufacture of the same after the inventor has obtained a patent therefor in Canada, without the consent or allowance of the inventor; and, under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires."

The material facts and dates are as follows:—

On March 1, 1892, a Mr. Jones, an American, obtained a patent in the United States for improvements in boiler and other furnaces. On the same day Mr. Jones applied in Canada for a Canadian patent and in England for a British patent for the same invention.

On July 12, 1892, the British patent was granted for fourteen years from March 1, 1892, but its duration for that period depended on the payment of the necessary fees.

On October 15, 1892, the Canadian patent was granted for eighteen years from October 15, 1892.

On March 1, 1897, the British patent expired, the fees necessary for keeping it subsisting not having been paid.

On September 1, 1898, the owners of the Canadian patent, i.e., respondents in this appeal, brought an action against the appellants for infringing that patent, and the plaintiffs were successful and obtained judgment in the action.

Afterwards the defendants in the action obtained leave to amend their pleadings in order to plead that before the commencement of the action the Canadian patent had expired by reason of the expiration of the British patent, and also by reason of the expiration of an Italian patent, to which, however, it is unnecessary now to allude.

A new trial was directed, and took place before Burbidge J., who had tried the action, and judgment was given for the defendants, i.e., the present appellants, on the ground that the amended defence was proved. From this decision (which is referred to as the judgment of the Exchequer Court) the plaintiffs appealed to the Supreme Court, and the judgment was reversed. Hence this appeal.

It is common ground, and their Lordships concur in the view, that a British patent is a foreign patent within the meaning of the Canadian Patent Act; and that the British patent and the Canadian patent were for the same invention, and that the former expired in March, 1897. The whole question, therefore, turns on the meaning and legal effect of the words "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires."

The words "if a foreign patent exists" invite the question—When—what time is referred to? The Supreme Court have held (by a majority) that these words refer to the date of the application for the Canadian patent; the Exchequer Court held that they referred to the date of the grant of the Canadian patent. This last construction is sufficient for the appellants in this particular case; but their counsel contended that even this construction is too narrow, and that the words refer to any time during the continuance of the Canadian patent, the duration of which is made to depend on the earliest termination of any foreign patent for the same invention. Their Lordships are of opinion that this wider construction of the words is the true one. They are unable to discover any sufficient reason for putting any more restricted meaning on the words. The language is clear and imperative. Their Lordships can only understand it as declaring that under all circumstances as

J. C. 1902 DOMINION COTTON MILLS COMPANY v. GENERAL ENGINEERING COMPANY OF ONTARIO.

soon as any foreign patent for the same invention expires the Canadian patent, if then existing, shall expire also. They can find no limit as to time except that the foreign patent must both exist and expire after the Canadian patent has been granted, and before it has ceased from any other cause. The French version of the Act is, if possible, even clearer than the English version. Both, however, express the same meaning.

The Supreme Court were naturally influenced by a prior decision of their own on s. 8 as it stood in its original shape. In *Dreschel* v. *Auer Incandescent Light Manufacturing Co.* (1) it was held that similar words in the original section referred to the date of the grant, and that a foreign patent obtained subsequently to the grant of a Canadian patent and expiring during its continuance did not affect its duration. Their Lordships do not think it necessary to reconsider this case; but assuming it to have been correct, having regard to s. 8 as it then stood, they are unable to concur in the view that in s. 8 as it now stands the date of the application has become the date to which the last clause applies.

Their Lordships will, therefore, humbly advise His Majesty to reverse the judgment of the Supreme Court, with costs to be paid by the respondents, and to restore the judgment of the Exchequer Court.

The respondents must pay the costs of this appeal.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitor for respondents: *S. V. Blake.*

(1) 6 Ex. C. R. 55; 28 Sup. C. R. 608.

[PRIVY COUNCIL].

ARCHAMBAULT ET VIR . . . . . PLAINTIFFS;

AND

ARCHAMBAULT ET AL. . . . . DEFENDANTS.

J. C.*
1902
July 8, 16.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA.

Practice as to concurrent Findings—Avoidance of Gifts made by Testator—Civil Code, art. 762.

Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—

Held, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered:

Held, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under art. 762 of the Civil Code where there was neither allegation nor evidence that they were made in expectation of death. The proviso in the article, "unless circumstances tend to render them valid," requires that those circumstances should be investigated.

APPEAL from a decree of the Court of King's Bench (May 29, 1901) affirming a decree of the Superior Court and dismissing the appellants' suit with costs.

The suit was brought to set aside the wills, codicils, and gifts made by the late Dr. Dieudonné Archambault, father of the female appellant and uncle of the two respondents, as well as a private writing of his in which he indicated the place in which he desired to be buried. The reasons invoked were insanity, weakness of mind of the deceased, fraud, and threats on the part of the respondents.

The question was one of evidence, which is discussed in their Lordships' judgment.

Brosseau, K.C., for the appellants.

S. Beaudin, K.C., and *Geoffrion*, for the respondents, were not heard.

* *Present:* LORD DAVEY, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.
1902
ARCHAMBAULT v. ARCHAMBAULT.

July 16. The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of the Court of King's Bench for the province of Quebec (Appeal Side) of May 29, 1901, confirming the judgment of the Superior Court, by which the action was tried in the first instance.

The action was brought for the purpose of setting aside the testamentary dispositions of a gentleman named Dr. Dieudonné Archambault, and certain gifts made by him in his lifetime, on the ground of his insanity, and on the ground that his testamentary dispositions and gifts were induced by the undue influence, cajolery, and threats of the first respondent, Miss Georgiana Archambault (hereinafter called the respondent), who was the defendant in the action.

The first appellant (hereinafter called the appellant), who was the plaintiff in the action, is the daughter and only child of Dr. Archambault.

In order to make the case, which has been argued before their Lordships, intelligible, some short account should be given of the history and relations of the parties.

Dr. Archambault, the testator, whose testamentary dispositions and gifts inter vivos it is sought to set aside, died in July, 1896, at the age of sixty-five. He was by profession a medical man, and seems to have had a considerable practice in Montreal. Many years ago—it is said in the year 1866—he had the misfortune to be affected with a syphilitic disease of some kind, caught, it is said, from attending a woman in childbirth. He apparently was not aware of what had affected him, and the disease was neglected. In 1875 he lost his wife, to whom, apparently, he was very much attached. She left an only daughter, the appellant, who was then thirteen years of age. The illness which Dr. Archambault thus contracted in the year 1866 appears to have affected his bodily health very seriously. He suffered from excruciating pains in his limbs, and otherwise his health was obviously affected. It is said that his mind was also affected by it. It is possible that it had some effect on his mental vigour; but the extent, if any, to which his mental faculties were affected is one of the issues of the suit, and their Lordships will deal with it presently.

Upon the death of his wife, Dr. Archambault induced his niece, Mademoiselle Georgiana Archambault, the respondent, to come and manage his household, which she did, giving up a situation in which she was earning her living as a governess or teacher in some teaching institution. She remained with him from the year 1875 to his death, in the year 1896—altogether twenty-one years of her life. There is not the slightest suggestion by any witness either on one side or the other that she in any way neglected the duties she had undertaken, or that she did otherwise than manage the doctor's household with great care and attention, and she also devoted much attention and care to Dr. Archambault, whose bodily weakness increased until his death.

So things went on until the appellant attained the age of twenty-one years, which was about the year 1882 or 1883. She soon afterwards married a gentleman named Labadie. It is said that she married Labadie rather against her father's will, and that he did not approve of the marriage. This at least is certain, that for some years after the marriage, and indeed until the doctor's death, there was some estrangement between the daughter and her father. Whose fault it was, of course, is in dispute between the parties. The one side attribute it to the daughter's neglect of her father, and the other side attribute it to the influence upon her father of the respondent, who, it is said, poisoned Dr. Archambault's mind against his daughter.

In the year 1893 Dr. Archambault gave up his practice in Montreal, and he then retired with his niece to a place called St. Lin, in the neighbourhood of Montreal, where he either bought or hired a house in which he resided until his death. A brother of the respondent named Jules Archambault came to reside with him, and assisted the doctor in the care of his business matters, his investments, and other matters of that character.

Their Lordships will now turn to the testamentary dispositions made by this gentleman. On September 15, 1885, he made his first will. By that will he gave an annuity of $260 to the respondent, and he gave the residue of his property to the

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appellant as his universal legatee, with a substitution in favour of her children. On August 17, 1887, the respondent's annuity was by a codicil increased to $300. On March 2, 1892, about the time when he gave up practice and retired from Montreal, he made a second will, by which he revoked his former will and codicil, and bequeathed to the respondent his household furniture and various personal articles, including his surgical instruments and so forth; and he also gave her the use and usufruct of a lodging in one of the houses which belonged to him, with a right to lease the same for her benefit; and instead of an annuity of $300 a year he gave her a legacy of $6000. The residue was given, as in the former will, to the appellant in life-rent, with a substitution in favour of her children. After they went to St. Lin, Dr. Archambault made various presents of money to the respondent, and he also gave her a building property in Montreal which he had bought as a speculation, and on which he had built houses. The result of these gifts was that at the testator's death his property consisted, including the subjects of these gifts, of about, speaking in round numbers, $100,000, of which the respondent would receive altogether, in legacies and gifts, about $30,000, and the appellant would receive the residue. It is said that the residue was not so much as the sum mentioned, which would be $70,000, and that it was not more than $60,000, or even less than that; but in round figures it may be taken, their Lordships think, that the niece profited by this gentleman's bounty to the extent of one-third of the estate, the daughter and her children being entitled to the other two-thirds.

The suit is, as has been said, for the purpose of setting aside the testamentary dispositions of March 2, 1892, and also the gifts inter vivos which were made to the niece; and the grounds upon which the suit is based are that the testator was non compos mentis, and that the dispositions in question were brought about by the undue influence and cajolery of the respondent.

A great many witnesses were called—medical men and friends of the testator, who had known him for a long period

—and in particular a gentleman who had known him well in his later years, the curate of the parish in which he died, and other clergymen who knew him during his later years. The evidence was extremely conflicting. Their Lordships having had the medical evidence read to them at great length—not too great length, but fully—and having had an opportunity of considering the medical evidence put forward on behalf of the appellant (the plaintiff), are not surprised that the learned judge who tried the action did not attach great weight to it. Their Lordships have not thought it necessary to hear counsel on the other side, and therefore they have not had the advantage of their comments on the evidence of the doctors; but it is enough for the present purpose to say that there was conflicting evidence, upon which it may be assumed in the appellant's favour that the judge might find either one way or the other without any charge of miscarriage of justice. Certainly there could be nothing like a miscarriage of justice in finding in favour of the respondent upon the issue of the testator's state of mind.

Upon the other point—the undue influence of the respondent —there is also conflicting evidence. The principal witnesses in favour of the present appellant are a person named Mademoiselle Destroismaisons, who appears to have been a workwoman, or a person employed in some similar occupation by the respondent in the household of the doctor, and Mademoiselle Cauchon, a great-niece of the doctor, who spent a month at his house at St. Lin within three years of his death, and who speaks to the doctor being more or less under the influence of the respondent. Mademoiselle Cauchon's evidence, taken alone, looked formidable; but it is fair to say that the cross-examination brought out the fact that the matters in which she represented that the doctor paid implicit obedience to the respondent were domestic matters in which you would expect an invalid to be obedient to the wishes expressed by his nurse, such as a matter of food, going out, and things of that character, and they are not matters which necessarily affected the state of his mind, or his testamentary capacity, or freedom from control in other respects. But, on the other hand, there is the evidence,

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which their Lordships have had an opportunity of looking through, of the witnesses Hunault, Mesnard, and others. One of the strongest points made against the respondent by the appellant is that she poisoned the mind of the doctor against his daughter, representing her as being a heartless person who was too glad to escape from his household by marriage, and who had completely neglected him. Now, the respondent's witnesses put a totally different complexion on the relations between the appellant and respondent. They say, on the contrary, that Dr. Archambault—who had all the fretfulness and irritableness, apparently, of an invalid, in addition to a somewhat irritable character, illustrated by the violent expression of his opinion on public questions—seemed to have thought that he was neglected by his daughter, and seemed to have taken umbrage at her not visiting him oftener, and at her allowing herself to be engrossed by the domestic cares of her own family from attention to himself. These witnesses state that, when Dr. Archambault expressed himself in these terms regarding his daughter, his niece, the respondent, was in the habit of endeavouring to mollify and soften his irritation with regard to his daughter, and that she would represent to him that his daughter had a house of her own to look after, that she had children to whom her attentions were primarily due, and that the cares of her household and her family were the causes of her apparent want of attention to her father. Those witnesses speak to same effect as the curate of St. Lin (where the doctor resided in the latter part of his life) and the vicar of the parish; and two clergymen named Strubb and Filiatrault also speak of his mental capacity and the independence of his mind in all matters of business.

Their Lordships do not feel called upon to express any judgment of their own on these issues which have been raised, and on which there is this conflict of evidence. The evidence has been considered by the learned judge who tried the action and saw the witnesses. His judgment is a short one, but none the worse for that, and it is expressed in these terms: "Considering that the plaintiff has not proved that the said Dieudonné Archambault was neither sound in mind nor master

of his will when he made the testaments, codicils, and donations which are sought to be set aside, and that it has not been established that the said testaments, &c., were the work of the fraud practised by, or the fear inspired by, the defendant on the sick brain of the said Dieudonné Archambault, but that it results in the contrary conclusion from the documents in the cause; that at all times when these testaments, &c., were consented to and signed the said Dieudonné Archambault enjoyed his mental faculties; that he was in a state to dispose of his goods, and exercised that right freely and without suggestion on the part of the defendant, or of any other person, and without any fraud or influence having induced him to make such disposition; and that he preserved until his decease the general administration of his goods and control of his fortune." On that finding the learned judge dismissed the action. It will be observed that the learned judge finds, not only that the evidence of the plaintiff was insufficient to prove her case, but that the defendant had affirmatively established the doctor's competence and freedom from undue influence.

The case then came by way of appeal before the Court of King's Bench. The Chief Justice, Sir Alexander Lacoste, was not sitting, for a particular reason which need not be mentioned, but the case was heard by four judges of that Court, and their unanimous judgment was delivered in a very full and apparently very carefully considered judgment of Bossé J., with the result that, after reviewing the evidence more fully than it had been reviewed in the judgment of the judge of first instance, the Court of King's Bench unanimously affirmed the judgment and dismissed the action.

Their Lordships, therefore, have concurrent judgments of the two Courts below on what is solely a question of fact; and their Lordships are the more disposed to attach weight to the circumstance from the evident signs, which appear to anybody who will read the judgment of Bossé J., of the care and pains which the learned judges have taken to go through the evidence, and to form their own conclusion upon it, and not merely to adopt that of the Court below. Of course, even four judges of the Court of King's Bench may err. Every one is liable to

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error. No doubt the appellant, and the appellant's counsel, think that the four judges took a wholly erroneous view of the evidence. The appellant's counsel, however, has not succeeded in convincing their Lordships that they did so, and it is plain on the face of their judgment that they have carefully discussed, analyzed, and considered the evidence. It is not the practice of this Board to disturb a judgment on a question of fact where the Courts below have unanimously agreed in their conclusion on the evidence, except where it is made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. This is certainly not a case in which their Lordships would be disposed to depart from that practice, or in which they would feel called upon to express a decided opinion of their own upon the result to which the evidence leads their minds. In saying this they do not desire to be understood as saying that they see, from their perusal of the evidence, any reason whatever for believing that either the learned judge of first instance or the learned judges in the Court of King's Bench have come to an erroneous conclusion.

There is only one other point to which reference need be made, and that is a point which has been raised by the learned counsel, who argued this case with great zeal and very fully on behalf of his client, on art. 762 of the Civil Code, which in the English version is in these words: "Gifts purporting to be inter vivos are void as presumed to be made in contemplation of death when they are made during the supposed mortal illness of the donor, whether it be followed or not by his death, unless circumstances tend to render them valid." The French is, "Si aucunes circonstances n'aident à les valider." The learned counsel contends that we ought to apply the rule laid down in that article of the Code to the gifts which were made by the testator, Dr. Archambault, to the respondent during his lifetime. Now, their Lordships think that the first answer to the argument which was put before them on that point is that this is not raised by the pleadings. There is no allegation, for example, that the gifts were made during the supposed mortal illness of the donor, which, of course, means during an illness

of the donor which was supposed by those about him, and believed by himself, to be mortal in its character—that is, likely to result within a short period in his death. There is no allegation of that kind in the pleadings. The nearest approach to it which the learned counsel can point to is, their Lordships think, in paragraph 19 of the declaration, which alleges the circumstances before mentioned of the doctor contracting a syphilitic contagion, which was followed gradually by syphilitic rheumatism and progressive locomotory ataxia, and that those two maladies went on en s'aggravant jusqu'à la mort. That is very different from an allegation that a particular gift was made in expectation of death—very different indeed from the allegation which would be required to base upon it any legal argument founded on art. 762 of the Code. This appears to have occurred to the plaintiff's advisers themselves, for their Lordships are informed that an attempt was made to raise this point before the judge of first instance; and, as a means of enabling the learned counsel for the plaintiff to raise it, an application was made to the learned judge to permit an amendment of the pleadings by introducing the necessary averments. That application, apparently, was not successful, and consequently the point was not allowed to be raised in the Court of first instance. The learned counsel for the appellants points out with perfect truth that the point is raised in his factum before the Appellate Court. That is quite true, but the application which had been made in the Court below was not renewed in the Appellate Court, and the Appellate Court had no materials, therefore, in the pleadings upon which they could deal with the point. As a matter of fact, their Lordships are informed that the point was not argued in the Court of Appeal—at least, not fully argued; and certainly there is no trace in the very careful judgment of Bossé J. of the point ever having been brought to their consideration, or ever having been considered by them. The inconvenience of raising for the first time on a final appeal a point which has not been the subject of consideration in the Courts below has been frequently pointed out both here and in the House of Lords. Certainly it is a rule of practice at this Board that a new point will not be

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entertained by their Lordships which might have been met by evidence in the Courts below. It will at once appear from the terms of the article of the Code, which have been read, that this is a point which might have been met by evidence, because the whole enactment of the article is made subject to the proviso "unless circumstances tend to render them valid." Now, if this point had been taken in the Court below, namely, that these gifts were made at a time when the testator was suffering from a supposed mortal illness, and knew that he was so suffering, that might have been met by evidence to shew that that was not the state of facts. It might have been met by evidence to shew that, notwithstanding the state of bodily health in which the donor was, the gift was nevertheless made under circumstances which render it a valid gift.

Their Lordships are, therefore, of opinion that they cannot entertain this point; and they think that there are neither pleadings nor facts before them which would entitle them to do so.

In the result their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants will pay the respondents' costs.

Solicitors for appellants: *Simpson & Co.*
Solicitors for respondents: *Simpson & Co.*

[PRIVY COUNCIL.]

NATIONAL BANK OF AUSTRALASIA, LIMITED . . . . . } DEFENDANTS;

AND

J. FALKINGHAM & SONS . . . . PLAINTIFFS.

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June 5, 6;
July 9.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Book Debts Act, 1896, *s.* 3—*Construction—Invalidity of Assignment does not extend to Covenants and Recitals.*

By the 3rd section of the Victorian Book Debts Act, 1896, it is enacted that no assignment or transfer of book debts shall be valid unless registered:—

Held, that by its true construction only that part of an instrument which effects assignment or transfer is invalidated by non-registration. The invalidity does not extend to the covenants and recitals therein contained.

Where, however, the unregistered assignment of a book debt contained covenants onerous to some of the assignors and a subsequent registered assignment omitted the same:—

Held, that, the second assignment being in substitution for the first, the covenants were no longer enforceable.

APPEAL from a judgment of the Supreme Court (June 14, 1901) setting aside a judgment of Hodges J.

The action was brought by the respondents against the appellants to recover the sum of 22,092*l.* 1*s.* 7*d.*, balance of a sum of 25,827*l.* 10*s.*, as moneys had and received by the appellants to the respondents' use, the respondents giving credit for the sum of 3735*l.* 14*s.* 5*d.*, moneys admitted by them to be due to the appellants.

The bank claimed to be entitled (*a*) to retain it as having been assigned to their bank by a deed dated June 6, 1899, or (*b*) to counter-claim for a larger sum on a covenant by the respondents in a previous deed of assignment of April 19, 1898. The primary judge allowed the counter-claim, and was against the bank on the first alternative only; the Full Court was against it on both.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH, and SIR ARTHUR WILSON.

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The two deeds and the circumstances under which the action was brought are sufficiently disclosed in the judgment of their Lordships.

The bank received from the Railway Commissioners the moneys payable to the respondents, and claimed to apply them under the terms of the deed of June 6, 1899, to the discharge, not only of the firm's debt of 3735*l.* 14*s.* 5*d.* to them, but also of the much larger debt due by J. Falkingham, the father. And to a suit by the respondents disputing this claim the bank alleged that the total debt due to them, namely, the debt standing in the name of Jonathan Falkingham and the debt standing in the name of the firm, was in fact due from the firm; they submitted the construction of the deed of 1899 to the Court, and they also contended that they were entitled to deal with the moneys in the way in which they had dealt with them by virtue of the provisions of the deed of April 19, 1898, which they contended was a still subsisting deed; and they further contended that the respondents were estopped by the recitals in that deed from contending that they were not indebted to the appellants as in the said deed mentioned. They also counter-claimed for payment by the respondents of the whole of the debt due both from Jonathan Falkingham and from the firm under the covenant of the firm contained in the deed of April 19, 1898.

The respondents answered that the deed of June 6, 1899, was executed by them and was accepted by the appellants in discharge of the earlier deed and in substitution for it, and that the earlier deed was thereby rescinded, and that the deed of April 19, 1898, was an assignment of book debts within the meaning of the Book Debts Act, 1896, and that both the deed and the covenant therein were inoperative, because the deed had not been registered. They further alleged that they had executed that deed by mistake, not understanding the meaning or effect of the deed, and that the recital in the deed that the firm were indebted to the appellants in the whole of the debt was a mistake of fact and contrary to the intention of the parties. They also alleged that they were induced to execute the deed by the representation of the bank manager that it

was only an assignment of their several interests to secure their several debts.

Hodges J. held that under the deed of June 6, 1899, the bank was only entitled to deal with the moneys as contended by the respondents; that the deed of April 19, 1898, was not rescinded by the deed of June 6, 1899, but that it was a subsisting deed, and that, notwithstanding that it had not been registered, it was operative so far as regards the covenants contained in it; and in the result judgment was given for the appellants on their counter-claim against the respondents for the whole of the money owing to the appellant bank both by Jonathan Falkingham and the firm.

The Supreme Court reversed this judgment. They agreed with Hodges J. as to the construction of the deed of 1899, but held that the deed of April 19, 1898, being in its terms inconsistent with the deed of June 6, 1899, was necessarily rescinded and put an end to by that deed; that the respondents were not estopped by the recitals in the deed of April 19, 1898, from setting up the true facts, and that inasmuch as the respondents were not indebted to the appellants in the whole debt, the appellants were only entitled to apply the moneys received from the Commissioners in satisfying the firm's debt of 3735*l.* 14*s.* 5*d.*, and in applying the share of Jonathan Falkingham in the moneys—whatever it might be—in part satisfaction of his debt; and directed an inquiry to ascertain the amount of that share.

Sir R. Reid, K.C., *George Wallace*, and *E. F. Mitchell*, for the appellants, contended that this judgment of the Supreme Court was wrong so far as it was against the bank, and that judgment should be entered for the appellants both on the claim and counter-claim. On the true construction of the deed of 1899 the whole of the debt due by the Railway Commissioners was assigned to and completely vested in the bank. Thereunder the bank was entitled to apply the whole of the moneys received by them under the assignment in paying off the whole of the debts due both from the father and the firm as moneys owing to them on the security of these presents.

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Otherwise they were so entitled under the deed of 1898. They contended that the obtaining the deed of 1899 was not either in intention or effect an abandonment by the bank of the rights which it possessed under the deed of the previous year. The later deed expressly provided that nothing therein contained should prejudice or affect any other securities then held by the bank. The assignment contained in the deed of 1898 was not a transfer of a book debt within the meaning of the Book Debts Act, 1896, and was not invalid for want of registration. But, however that might be, there was nothing in that Act to invalidate in law or equity the recitals or independent covenants in a deed, merely because it also contained an assignment required by the Act to be registered and invalid for want of registration. The invalidity did not extend to those provisions to the validity of which registration was not essential. Reference was made to *In re Isaacson* (1); *Tidyman* v. *Collins*. (2)

Manisty, K.C., and *Henn Collins*, for the respondents, contended that the Supreme Court was right in their construction of the deed of 1899. The object of the assignment was to secure the debt of the firm, and the evidence was to the effect that all parties at the time so understood it. Besides, the father had no authority to pledge anything more than his own share of the assigned debt, in order to cover his own separate liability. He had no power to pledge his sons' interest. The deed of 1898 was not registered because the money was not owing by the firm. The deed of 1898, moreover, was inconsistent with that of 1899, and, the two deeds not being capable of being read together, the earlier deed was rescinded by the later one. Not having been registered under the Book Debts Act, 1896, it was invalid and inoperative for all purposes.

Counsel for appellants were not heard in reply.

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The judgment of their Lordships was delivered by

LORD LINDLEY. This appeal raises two questions, namely, (1.) What is the true construction and legal effect of a deed

(1) [1895] 1 Q. B. 333. (2) (1878) 4 Vict. L. R. 478.

dated June 6, 1899, executed by a firm of contractors in favour of their bankers and registered as required by the law of the Colony of Victoria? And (2.) What effect, if any, has that deed on a prior deed of April 19, 1898, executed by the same firm in favour of the same bankers, but not registered?

The facts which are material are few and undisputed.

J. Falkingham & Sons are a firm of contractors consisting of a father and two sons. On December 29, 1886, they entered into a contract with the Government of Victoria to construct a certain railway; and on January 31, 1887, they entered into articles of partnership for the purpose of carrying on and completing this contract. By these articles the capital of the firm was 8000*l.*, to be advanced by the father, and this sum was to be a debt due to him from the firm and to bear interest at 8 per cent. If any further capital was brought in it was to be treated in the same way. Each partner was to indemnify the firm against his separate debts. The National Bank of Australasia were the bankers of the firm. Provision was made for fortnightly drawings by the partners subject to account. After the completion of the railway the affairs of the plaintiffs were to be wound up; the plaintiffs' assets were to be realized; the costs of winding-up and the debts of the firm were to be paid; accounts were to be taken; the capitals of the partners were to be paid with interest; and the residue was to be divided between the partners as mentioned in the articles.

The sons had no capital in the firm from first to last; and the financial arrangements of the firm were left by them to their father.

The railway was completed in 1891. Differences arose between the contractors and the Government, and much litigation took place before the contractors obtained payment of all that was due to them. In this litigation the contractors were at first unsuccessful; but on appeal to this Board (1) they in 1900 obtained judgment for a considerable sum of money, i.e., about 25,500*l.* In August, 1900, the bank received this sum from the Government under the deed of June 6, 1899, which will be referred to presently. The bank insists on its right to retain

(1) See [1900] A. C. 452.

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the whole of this sum against the contractors until repaid all its advances.

The contractors had not themselves the means either of constructing the railway or of prosecuting their appeal without the assistance of the bank, and in April, 1898, and again in June, 1899, the bank required and obtained deeds from the contractors to secure their advances. In March, 1898, the amount due to the bank for advances was 34,555*l.*, of which 31,316*l.* stood in the books of the bank as due from the father and the rest as due from the firm. The only security the bank then held was a mortgage on property of the father estimated to be worth 15,000*l.*

This was the state of things when the deed of April 19, 1898, was executed. It is set out in the record. It is made between the contractors and the bank; it recites that the contractors are indebted to the bank in the sum of 34,555*l.*, of which 31,316*l.* stands in the name of the father and the remainder in the name of the contractors; the contractors then assign to the bank their interest in the contract with the Government and the moneys payable under it to secure the whole sum of 34,555*l.* and further advances; and they covenant jointly and severally with the bank to pay that sum and interest and further advances. The deed empowers the bankers to prosecute the appeal to the Privy Council, and all moneys expended for that purpose are included in the security and covenants of the deed.

This deed was not registered in the Colony under the Book Debts Act, 1896. The bank desired to have it registered; but the father, writing for the firm, objected on the ground that the sons did not owe the bank the whole 34,555*l.* as stated in the deed, and that it disclosed a large indebtedness which would be published in trade circulars and injure the credit of the firm.

Some discussion took place before their Lordships as to the effect of non-registration. But it seems plain to their Lordships that, assuming the moneys payable by the Government under the contract and assigned to the bank to be a book debt within the meaning of the Act, the omission to register the deed of April, 1898, only invalidated the assignment of that debt, and did not invalidate or in any way affect the recitals and

covenant for payment contained in the deed. The 3rd section of the Act merely says "no assignment or transfer" of book debts shall be valid unless registered, and their Lordships are unable to accept the suggestion that "assignment or transfer" means the whole instrument which contains it, and is not confined to that part of the instrument which operates as an assignment or transfer. Their Lordships agree with the view of the Colonial Courts on this point.

Not being able to procure the registration of the deed of April 19, 1898, the bank obtained from the firm another deed dated June 6, 1899. Drafts of this deed were prepared, and objections were made to them as prepared; but ultimately the deed as printed in the record was executed, and was duly registered as required by the Act already referred to. No claim is made to rectify this deed. The drafts cannot, therefore, properly be received in evidence to alter its language; still less to explain or assist in the interpretation of the deed as finally executed. The deed in its final shape is by no means well drawn, as is often the case when drafts are altered. The legal effect of the deed appears to their Lordships to be quite plain up to a certain point. It is made between the contractors and the bank. It refers to the railway contract with the Government and the completion of that contract, and to disputes between the Government and the contractors. It then proceeds as follows:—

"And whereas the said Jonathan Falkingham is now indebted to the said bank in a certain sum of money and such indebtedness stands in the books of the said bank in the name of Jonathan Falkingham, and the assignors are jointly and severally indebted to the said bank in another sum of money, and such last-mentioned indebtedness stands in the books of the said bank in the name of J. Falkingham & Sons, and for the purpose of securing the repayment of such indebtedness respectively in the manner hereinafter mentioned the assignors have agreed to enter into and execute these presents. Now this indenture witnesseth that, in pursuance of the said agreement and in consideration of such indebtedness as aforesaid respectively and of the agreement lastly hereinafter contained,

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he the said Jonathan Falkingham as to his said indebtedness and they the assignors as to their said indebtedness do and each of them doth by these presents assign . . . . unto the said bank and its assigns all that and those the right, title, interest, powers, and remedies of them the assignors in, under, to, and by virtue of the said contract of the 29th day of December, 1886, and in and to all moneys now due or payable or which may hereafter become payable thereunder (without any reservation or exception whatsoever), including all their rights, powers, and privileges in connection with any action, suit, or proceeding taken or instituted by them in regard thereto, or in connection with any judgment or award already delivered or made, with the right of appeal therefrom (including appeal to the Privy Council) . . . . "

Now, notwithstanding the words "as to his said indebtedness" and "as to their said indebtedness," it appears to their Lordships plain beyond all controversy, first, that all the moneys due and to become due from the Government to the contractors under the contract referred to are assigned to the bank; and, secondly, that these moneys are so assigned as a security for the debt due from the father, and also for the debt due from the firm, including what further advances might be made for prosecuting the claims of the contractors against the Victoria Government. Both of these indebtednesses, i.e., both of these debts, are plainly charged on the moneys assigned. The mode in which the moneys assigned are to be applied in paying the debts appears afterwards, and is thus expressed: "All moneys received by the bank or its assigns under or by virtue of these presents shall be applied by it or them in or towards satisfaction of the principal and interest moneys from time to time owing to it or them on the security of these presents." Nothing can be plainer or more simple. The debt of the father is owing to the bank on the security of his covenant which is contained in the deed, and is therefore equally within the description of money owing to the bank "on the security of these presents" with the money owing on the covenant of the firm. The whole of the debts due to the bank are to be paid out of the moneys assigned to the bank as a security

for them; and under this security no part of the moneys so assigned can be claimed by the contractors from the bank so long as anything is due to the bank in respect of any of the debts secured upon and made payable out of those moneys.

Considering the position of the sons and their entire dependence on their father and on his ability to raise money, there is nothing unbusinesslike or surprising in their joining their father in giving such a security to the bank.

But it is said that there are expressions in the deed which shew that its true meaning is very different from that above mentioned, and the learned judges in the Colony have so held. With unfeigned respect to them, their Lordships cannot agree with them. First of all it is important to observe that there is not anywhere in the deed any allusion whatever to the share of any partner in the partnership assets, and very properly. What is assigned is a particular partnership asset which is part of the common stock of the firm; and not shares in that asset, which could only be ascertained by taking the partnership accounts.

Any construction of the deed which prevents the bank from paying the debts due to it out of the moneys assigned to them until the partnership accounts are taken is inconsistent with the direction for the application of the money assigned to them as a fund for their payment.

The order of the Full Court enables the bank to repay itself the debt of the firm, but not the debt of the father, until the value of his interest in the asset assigned has been ascertained.

Their Lordships can find nothing in the deed to warrant this conclusion. The word "respectively," which occurs once or twice, was apparently inserted to emphasise the fact that there were two indebtednesses and not one. But the word "respectively" in this deed was not really wanted, and does not affect the construction of the charge. The words "as to his indebtedness" cannot be expanded into "to the extent of his interest in the debt assigned," nor into "to the extent of his liability as between himself and his co-partners in the debts secured to the bank." The words might be operative if the bankers had a surplus to distribute after paying themselves.

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Their Lordships have no clear conception of the meaning of the words in question, and are of opinion that such vague and meaningless expressions do not control or qualify the direction in the deed for application by the bank of the money received by it under the assignment, and which direction is clear and unmistakable.

Then there are the covenants for the payment of the debts secured. The words "in respect of his indebtedness" in these covenants are important, and prevent the covenants from being joint and several covenants to pay the whole amount due to the bank (as in the first deed). The covenants in the second deed are—first, a several covenant of the father to pay his debt; and, secondly, a joint and several covenant of the firm to pay the firm's debt. But this form of covenant, although consistent with the construction put on the rest of the deed by the Colonial Court, is equally consistent with the construction put upon it by their Lordships.

The form of the covenants does not either alone or in conjunction with the obscure words already commented upon cut down the charge on the moneys assigned.

Upon this deed of June 6, 1899, their Lordships have come to the conclusion that the construction contended for by the bank is correct, and that the bank is consequently entitled to judgment in the action brought against it by the contractors.

The bank also contends that, in addition to this security, the bank is entitled to enforce against the contractors their joint and several covenant contained in the first deed of April 19, 1898. A counter-claim to this effect was pleaded by the bank. The bank relies on the fact that there was no agreement to cancel the first deed, that it has never been cancelled or given up or asked to be given up, and the benefit of it is distinctly reserved to the bank by general words in the second deed of June 6, 1899. The words relied on are as follows:—

"Nothing herein contained shall suspend, prejudice, or affect the rights and remedies of the said bank in respect of the said indebtedness respectively, or of any part or parts thereof, or prejudice or affect any other securities or security now held or hereafter taken by the said bank."

In answer to this contention the contractors put in a reply to the effect that the first deed was executed under a mistake and upon the representation of the manager of the bank that the covenants were restricted to the respective indebtedness of the covenantors. It was for the contractors to prove this if they could. Their attempt to prove it at the trial utterly failed. The bank manager was dead; the contractors' testimony was disbelieved; and their Lordships think it unnecessary to say more on this attempt of the contractors to invalidate the first deed.

Their counsel further urged that the non-registration of the first deed invalidated the covenants contained in it. Their Lordships have already stated their reasons for rejecting this contention.

Lastly, it was urged that the two deeds were so differently framed as to be really inconsistent and to lead to the inference that the second deed was intended by all parties to be substituted for the first. Upon this point there was a difference of opinion in the Colony. Hodges J. considered that the first deed still remained in force; the Full Court took a different view, and held that the second deed was substituted for the first. Their Lordships have carefully considered this question, which they regard as the most difficult in the case; and they have come to the conclusion that the view taken by the Full Court ought to prevail. There is no doubt that the bank wanted the second deed because they could not get the first registered. It is also clear that the great object of the bank was to make sure of the fund assigned to them. The covenants of the sons were comparatively worthless to the bank. They were, however, very burdensome to the sons in the form in which they were framed in the first deed. It appears to their Lordships that the main consideration which induced the contractors to execute the second deed was to get rid of the burden imposed by the recitals and covenants in the first deed; and that the bank was willing to meet their views to this extent, provided the bank preserved its hold on the fund assigned. This conclusion is arrived at by comparing the two deeds together, bearing in mind the circumstances which

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rendered the second deed desirable to both parties. The bank held other securities for the moneys owing by the contractors: these are preserved by the general words in the second deed relied upon by the bank; and it is not necessary in order to give effect to the words to hold that the first deed is preserved by them. The bank's counter-claim, therefore, cannot be supported; but having regard to the defence pleaded to it, and to the costs occasioned by it, and to the evidence of the contractors in support of it, their Lordships do not think it right that the contractors should have any costs which that defence or the counter-claim may have occasioned.

Their Lordships regard the right of the bank to retain the fund assigned, and apply it in payment of their advances in full, as the great point in dispute from first to last; and on this point the bank has now succeeded. All the rest is comparatively unimportant, and the costs of the counter-claim may be fairly treated as balanced by the costs occasioned by the unfounded defence pleaded to it.

Their Lordships will, therefore, humbly advise His Majesty to discharge the orders appealed from, and to direct judgment in the action to be entered for the defendants, i.e., the bank, with costs; and to direct judgment on the counter-claim to be entered for the plaintiffs in the action, i.e., the contractors, without costs, and to order the plaintiffs in the action to pay the costs of the appeal to the Full Court in Victoria.

The plaintiffs in the action, i.e., the contractors, must pay the costs of this appeal.

Solicitors for appellants: *Markby, Stewart & Co.*
Solicitors for respondents: *Iliffe, Henley & Sweet.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1902, will be as follows :—

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British goods on board a British ship within the territorial waters of Muscat were seized by an officer of the British Navy under the authority of a proclamation issued by the Sultan, the sovereign ruler, of Muscat :—

Held, that the seizure having been shewn to be lawful by the law of Muscat no action could be maintained in this country by the owner of the goods against the naval officer. CARR *v.* FRACIS TIMES & Co. - - H. L. (E.) 176

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COMPANY—*Issue of Shares—Payment of Commission in Consideration of Subscribing for Shares—Option of Subscribers to take further Shares—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8, *sub-s.* 2.

To raise working capital a company offered shares at par to the appellant and some other persons with an option to take further shares at par within a certain time. The appellant subscribed for shares, and, the market price having

COMPANY—*continued.*
risen to a premium, desired to take up the further shares:—

Held, reversing the decision of the Court of Appeal, that this was not an application of shares or capital money directly or indirectly in payment of commission, discount, or allowance within the meaning of the Companies Act, 1900, s. 8, sub-s. 2, and (the transaction being otherwise unobjectionable) that the appellant was entitled to exercise the option.

Burrows v. *Matabele Gold Reefs and Estates Co., Ld.*, [1901] 2 Ch. 23, in effect overruled. HILDER *v.* DEXTER - - H. L. (E.) 474

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A county council, being incorporated under s. 79 of the Local Government Act, 1888, is a purely statutory body and has not under s. 2 of that Act the position and powers of a municipal or common law corporation. The statutory powers of the London County Council to purchase and work tramways do not empower it to work omnibuses in connection with the tramways, the omnibus business not being incidental to the tramway business.

The council was restrained by injunction from so acting ultra vires in an action brought by the Attorney-General on the relation of rival omnibus proprietors.

The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute.

The decision of the Court of Appeal, [1901] 1 Ch. 781, affirmed. LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL - - H. L. (E.) 165

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COVENANT — *Judgment — Merger — Mortgage — Rate of Interest — Ancillary and Independent Covenants.*

A mortgage deed contained a proviso for redemption if the mortgagors should pay the principal with interest after the rate thereinafter covenanted. The mortgagors covenanted to repay the principal on a day named with interest at 5 per cent., and if the principal was not then paid, to pay interest at that rate half-yearly on so much of the principal as should remain unpaid. The mortgagors having made default, the mortgagees recovered judgment against them for principal and interest upon the covenant.

An action having been brought by another mortgagee for an account of all moneys due to incumbrancers:—

Held, that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent. interest, yet upon the true construction of this mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent.

The decisions of the Master of the Rolls and the Court of Appeal in Ireland, *Usborne* v. *Limerick Market Trustees*, [1901] 1 I. R. 85, reversed on this point. ECONOMIC LIFE ASSURANCE SOCIETY *v.* USBORNE - - H. L. (I.) 147

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EMPLOYER AND WORKMAN—*Compensation—Factory, Employment on or in or about a—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The enactment in s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, "This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a .... factory ...." means employment on or in or about their own factory. Therefore a workman, who is sent by his employers on their business to a factory in respect of which they are not the occupiers, and therefore not the undertakers within the meaning of the Act, is not entitled to compensation from them for an injury which he receives there.

Francis v. *Turner Brothers*, [1900] 1 Q. B. 478, approved.

The decision of the Court of Appeal, [1901] 1 K. B. 780, affirmed on this point. WRIGLEY *v.* WHITTAKER & SONS - - H. L. (E.) 299

2. —— *Compensation—Undertakers—Sub-contractor—Liability of Sub-contractor to indemnify Undertakers—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 4, 7.

In the case of a building a sub-contractor may be an undertaker within the meaning of the Workmen's Compensation Act, 1897.

The appellants undertook to build a house, and agreed with a sub-contractor that he should slate the roof. A workman employed by the sub-contractor was killed in the course of his employment, and his widow was awarded compensation against the appellants as undertakers under the Workmen's Compensation Act, 1897:—

Held, by the Earl of Halsbury L.C. and Lords Shand and Davey, Lords Brampton and Robertson dissenting, that the sub-contractor would have been liable as an undertaker independently of s. 4 of the Act, and that the appellants were entitled to be indemnified by him against the amount of compensation awarded.

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Valuable tapestries were affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels. They could be removed without doing any structural injury. On the death of the tenant for life:—

Held, that the tapestries, put up with that purpose and attached in that manner, did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life, and were removable by her executor.

The decision of the Court of Appeal, *In re De Falbe*, [1901] 1 Ch. 523, affirmed. LEIGH *v.* TAYLOR - - - H. L. (E.) 157

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INSURANCE—*Capture—Property of Alien Enemy—Loss before Beginning of War—Intention to wage War—Seizure by Enemy's Government of Property of its own Subject—Validity of Insurance—Public Policy.*

Where a subject of a foreign Government insures treasure with British underwriters against capture during its transit from the foreign State to this country, and the foreign Government seizes the treasure during the transit, and war is afterwards declared between the foreign and the British Governments, the insurance is valid, and an action may be maintained in this country against the underwriters after the restoration of peace, though the seizure is made in contemplation of war, and in order to use the treasure in support of the war.

The important date is the seizure before the declaration of war.

INSURANCE—*continued.*

Such an insurance is not against public policy.

Public policy is not a safe or trustworthy ground for legal decision.

The decision of the Court of Appeal, [1901] 2 K. B. 419, affirmed. JANSON *v.* DRIEFONTEIN CONSOLIDATED MINES, LIMITED **H. L. (E.) 484**

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INSURANCE, MARINE — *Policy — Ship valued for Policy at less than Real Value — General Average Loss—Salvage—Liability of Underwriter.*

In an insurance on ship, cargo and freight the ship was insured for the sum at which she was valued in the policy. During the currency of the policy a general average loss occurred and a sum awarded in a salvage action had to be paid. In the salvage action the value of the ship was proved to be above the policy value. In the average statement the proved value was taken as the contributory value of the ship, and the rights of all parties were adjusted on that footing. In an action on the policy:—

Held, that the underwriters were liable only for that proportion of the salvage and general average losses which the policy value bore to the proved value.

The decision of the Court of Appeal, [1901] 2 K. B. 896, affirmed. STEAMSHIP "BALMORAL" COMPANY *v.* MARTEN - - **H. L. (E.) 511**

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A proviso in a lease for re-entry, if the lessees being a company should enter into liquidation either compulsory or voluntary, applies to the case of a solvent company going into voluntary liquidation for the purpose of reconstruction or amalgamation only, and is "a condition for forfeiture on the bankruptcy of the lessee" within the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 6.

The decisions of Kekewich J. and the Court of Appeal, [1901] 1 Ch. 499, affirmed as to these points.

Horsey Estate, Limited v. *Steiger*, [1899] 2 Q. B. 79, approved as to these points. FRYER *v.* EWART - - - **H. L. (E.) 187**

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MISTAKE—Rectification of deed—Solicitor and client—Independent advice - **271**
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MORTGAGE — *Clog on Redemption — Agreement subsequent to Mortgage—Option to purchase Mortgaged Property—Conditional Sale.*

A mortgagor and mortgagee may, by a separate and independent transaction subsequent to the mortgage, make a valid agreement which gives the mortgagee the option of purchasing the mortgaged property, and thus may have the effect of depriving the mortgagor of his right to redeem.

The decision of the Court of Appeal, [1902] 1 Ch. 53, affirmed. REEVE *v.* LISLE
H. L. (E.) 461

2. —— *"Once a Mortgage always a Mortgage" — Clog on Redemption — Tied Public-house — Mortgage of Leasehold Public-house—Covenant by Mortgagor to take Beer during the Term from Mortgagee only.*

In a mortgage of a leasehold public-house by a licensed victualler to brewers the mortgagor covenanted with the mortgagees that he and all persons deriving title under him should not during the continuance of the term, and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased of the mortgagees:—

Held, that this covenant was a clog on the equity of redemption, and that the mortgagor, on payment of all that was due upon the security, was entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the tie.

Santley v. *Wilde*, [1899] 2 Ch. 474, commented on.

The decisions of Cozens-Hardy J., [1900] 1 Ch. 213, and the Court of Appeal, [1900] 2 Ch. 445, affirmed. NOAKES & Co. *v.* RICE
H. L. (E.) 24

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NEW SOUTH WALES—Laws of. **207, 416, 422**
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NEW ZEALAND—Laws of. - **56, 396, 563**
See PRIVY COUNCIL APPEALS. 26—28.

OMNIBUS BUSINESS—County council—Tramway business—Ultra vires - **165**
See CORPORATION.

ONTARIO—Powers of company—Formation and investment of reserve fund—Purchase by director and resale to company **83**
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OPTION—Commission—Option of subscribers to take further shares - - - **474**
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PARTIES—Title to sue—Contract entered into on behalf of a foreign State - **524**
See PRACTICE. 3.

PATENT—*Prolongation of Patent—Petition by Assignees—Accounts of Inventor's Profits.*

Petition by assignees of a patent for its extension dismissed, no means of judging whether the inventor had been remunerated having been given. An application for adjournment was refused as unprecedented. PEACH'S PATENT. *Ex parte* PEACH AND BOSWELL, HATFIELD & Co.
P. C. 414

—— Expiry of patent — British patent a foreign patent - - - - **570**
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PERPETUITY—Absolute gift, Cutting down—Gift over on a compound event—Remoteness - - - - **14**
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POLICY.
See under INSURANCE, INSURANCE, FIRE, and INSURANCE, MARINE.

POOR LAW — *Settlement—Capacity of deserted Wife to acquire a Settlement—Poor Law Settlement (Scotland) Act*, 1898 (61 & 62 *Vict. c.* 21), *s.* 1.

By s. 1 of the Poor Law Settlement Act, 1898, "No person shall be held to have acquired a settlement in any parish in Scotland by residence therein, unless such person shall . . . . have resided for three years continuously in such parish and shall have maintained himself . . . . and without having received or applied for parochial relief. . . . .":—

Held, that a married woman having a husband

POOR LAW—*continued.*
living from whom she has derived a settlement cannot, although deserted by him, acquire a settlement different from that of her husband.

Gray v. *Fowlie*, (1847) 9 D. 811, affirmed.

Decision of the Court of Session, Scotland, (1901) 3 F. 705, reversed. RUTHERGLEN PARISH COUNCIL *v.* GLASGOW PARISH COUNCIL
H. L. (Sc.) 360

PRACTICE — *Appeal — Jurisdiction—Appeal to House of Lords from Order of Court of Appeal in Ireland—Certiorari—Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *ss.* 3, 12—*Supreme Court of Judicature Act* (*Ireland*), 1877 (40 & 41 *Vict. c.* 57), *s.* 86.

No appeal lies to the House of Lords from an order of the Court of Appeal in Ireland with respect to the issue of a writ of certiorari. THE QUEEN (AT THE PROSECUTION OF THE COUNTY COUNCIL OF KILDARE) *v.* BARTON, AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY OF IRELAND - - - - H. L. (I.) 268

2. —— *Counsel's Authority—Compromise of Action—Agreement to Refer—Authority exceeded by Counsel — Limitation of Counsel's Authority unknown to other side.*

A counsel has no authority to refer an action against the wishes of his client or upon terms different from those which his client has authorized. If he does so refer it the reference may be set aside although the limit put by the client on his counsel's authority is not made known to the other side when the reference is agreed upon. The Court before whom the question of setting aside the reference comes is not bound to sanction an arrangement made by counsel which is not in the opinion of the Court a proper one.

The plaintiff in an action for defamation of character authorized her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in Court. Her counsel, who did not make this limitation of his authority known to the defendant's counsel, agreed with the latter to refer the action without any disclaimer of imputations:—

Held, that the counsel having exceeded his authority the plaintiff was entitled to have the agreement to refer set aside and the cause referred to the list for trial.

The decision of the Court of Appeal, [1902] 1 K. B. 838, reversed. NEALE *v.* GORDON LENNOX
H. L. (E.) 465

3. —— *Title to sue—Contract entered into on behalf of a Foreign State.*

There is no such rule as that the monarch or other titular head of a foreign sovereign State is the only person who can sue here in respect of the public property or interest of that State.

The Spanish Minister of Marine in Madrid and two other persons brought an action in the Court of Session against the respondents for damages for failure to deliver warships within the time stipulated by contract. The parties to the contract were described as "The Chief of the Spanish Royal Naval Commission," and the Commissary of the Commission (mentioning their names) both in the name and the representation of his Excellency the Spanish Minister of Marine

PRACTICE—*continued.*
in Madrid, hereinafter called the Spanish Government on the one part," and the respondents (a shipbuilding company in Scotland) on the other part:—

Held, reversing the decision of the Second Division of the Court of Session, (1901) 4 F. 319, that the Spanish Minister of Marine for the time being was entitled to maintain the action though he was not Minister of Marine at the date of the contract. DON JOSE RAMOS YZQUIERDO Y CASTANEDA *v.* CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY - - H. L. (Sc.) 524

—— Appeal from Cape of Good Hope—Special leave—Martial law—Civil tribunals 109
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—— Appeal from Isle of Man—Special leave 81
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—— Appeal from Natal—Special leave - 51
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—— Appeal in formâ pauperis—Special leave
See PRIVY COUNCIL APPEALS. 12. 561

—— Concurrent findings — Avoidance of gifts made by testator - - - 575
See PRIVY COUNCIL APPEALS. 4.

—— Costs—Income tax - — - 422
See PRIVY COUNCIL APPEALS. 23.

—— New trial—No application for discovery 429
See PRIVY COUNCIL APPEALS. 19.

PRINCIPAL AND AGENT—*Company—Secretary—Representations — Certification of Transfer—Estoppel.*

In permitting its secretary to certify transfers of shares, a company does not authorize the secretary to do more than give a receipt for certificates of shares which are actually lodged in the office. If the secretary gives a receipt or an acknowledgment for certificates which have not been lodged, the company is not estopped from setting up the true facts.

Transfers of shares in a company having been lodged with the company's secretary without the certificates for the shares, the secretary fraudulently certified upon the transfers that the certificates for the shares were in the company's office. The proposed transferee having brought an action against the company for refusing to register him as the owner:—

Held (Lord Robertson doubting), that the company was not estopped from shewing that the proposed transferor had no shares to transfer, and that the action would not lie.

Grant v. *Norway*, (1851) 10 C. B. 665, approved.

Observations upon the doctrine of estoppel by representation. GEORGE WHITECHURCH, LIMITED *v.* CAVANAGH - - - H. L. (E.) 117

PRIVY COUNCIL APPEALS — AUSTRALIA (SOUTH)—*Covenant not to Assign a Lease without Consent of Lessor—Injunction.*

A covenant by a lessee not to assign without the lessor's consent runs with the land, and applies to a reassignment to the original lessee. An injunction will lie on a threat to commit a breach of it.

Doherty v. *Allman*, (1878) 3 App. Cas. 709, followed, and held to be especially applicable

PRIVY COUNCIL APPEALS — AUSTRALIA (SOUTH)—*continued.*
under the Real Property Act system of land registry in South Australia. McEacharn *v.* Colton - - - - - **P. C. 104**

2. —— **AUSTRALIA (WESTERN)**—*Western Australia Municipal Institutions Act* (59 *Vict. No.* 10), *s.* 109—*Exercise of Statutory Powers by Public Body—Compensation.*

The appellant municipality, in the exercise of authority conferred by the Western Australia Municipal Institutions Act (59 Vict. No. 10), s. 109, and at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road:—

Held, that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred. East Fremantle Corporation *v.* Annois **P. C. 213**

—— New South Wales - - **207, 416, 422**
See Privy Council Appeals. 23—25.

—— Victoria - - - **543, 552, 585**
See Privy Council Appeals. 29—31.

3. —— **CANADA**—*Patent—Expiry of Patent—British Patent a Foreign Patent—Canadian Patent Act* (*R. S. O., c.* 61, *s.* 8)—55 *&* 56 *Vict. c.* 24, *s.* 1—*Construction.*

By the true construction of s. 8 of the Canadian Patent Act, c. 61 of the Revised Statutes of Canada, as amended by Canadian Act 55 & 56 Vict. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act. Dominion Cotton Mills Company *v.* General Engineering Company of Ontario - - - - - **P. C. 570**

4. —— *Practice as to concurrent Findings—Avoidance of Gifts made by Testator—Civil Code, art.* 762.

Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—

Held, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered:

Held, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under art. 762 of the Civil Code where there was neither allegation nor evidence that they were made in expectation of death. The proviso in the article, "unless circumstances tend to render them valid," requires that those circumstances should be investigated. Archambault et vir *v.* Archambault et al. **P. C. 575**

5. —— *Manitoba—Powers of Local Legislature—British North America Act, s.* 92, *sub-s.* 16—*Manitoba Liquor Act*, 1900 (63 *&* 64 *Vict. c.* 22).

The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the provincial legislature, its subject being and having been dealt with as a matter of a merely local nature in the province

PRIVY COUNCIL APPEALS—CANADA—*contd.*
within the meaning of British North America Act, 1867, s. 92, sub-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A. C. 348, followed. Attorney-General of Manitoba *v.* Manitoba Licence Holders' Association **P. C. 73**

6. —— *Ontario—Powers of Company—Formation and Investment of Reserve Fund—Purchase by Director and Resale to Company—Law of Canada—Canadian Act* 27 *&* 28 *Vict. c.* 23.

It is an elementary principle that a Court has no jurisdiction to interfere with the internal management of companies acting within their powers.

The company must sue to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must shew that the acts complained of are either fraudulent or ultra vires.

A company formed by letters patent under Canadian Act 27 & 28 Vict. c. 23 is not bound to divide all its profits on each occasion amongst its shareholders. It can legally reserve any portion thereof at its own discretion, and a Court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit of profit and loss or carried to credit of a reserve, it may lawfully, in the absence of any express power, be invested on such securities as the directors may select subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make. It is not ultra vires for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investment so long as it appears to be bonâ fide.

Where a director purchased property without mandate from the company and under such circumstances as did not make him a trustee thereof for the company, and thereafter resold the same to the company at a profit:—

Held, that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made.

In re Cape Breton Co., (1884) 26 Ch. D. 221 and (1885) 29 Ch. D. 795, approved. Burland *v.* Earle - - - - - **P. C. 83**

7. —— *Quebec—Acts done under Statutory Authority—Non-liability for Damage—Civil Code of Lower Canada, art.* 356—*Dominion Railway Act*, 1888, *ss.* 92, 288—*Construction—Practice—Special Leave to Appeal on Terms as to Costs.*

A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute.

Geddis v. *Proprietors of Bann Reservoir*, (1878)

PRIVY COUNCIL APPEALS—CANADA—*contd.*

3 App. Cas. 430, 438, and *Hammersmith Ry. Co.* v. *Brand*, (1869) L. R. 4 H. L. 171, 215, followed.

The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers:—

So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

Appeal allowed, appellants to pay respondent's costs in accordance with the terms on which special leave to appeal was granted. CANADIAN PACIFIC RAILWAY COMPANY *v.* ROY - **P. C. 220**

8. —— *Quebec—Powers of Provincial Legislature—Quebec Act*, 58 *Vict. c.* 69—*By-law of Corporation granting Exclusive Rights—Construction.*

Under a by-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a licence previously granted by the city to the respondents for a similar purpose:—

Held, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the provincial legislature, and none the less so because it excluded for a limited time the competition of rival traders:

Held, also, that by the true construction of the by-law the city did not themselves revoke the licence to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected. HULL ELECTRIC COMPANY *v.* OTTAWA ELECTRIC COMPANY AND CORPORATION OF THE CITY OF HULL - - - **P. C. 237**

9. —— **CAPE OF GOOD HOPE**—*Electric Leak—Escape of Electric Current—Disturbance to Submarine Cable—Tramway—Act* 22 *of* 1895, *s.* 4—*Act* 29 *of* 1896, *s.* 4—*Construction.*

The principle of *Rylands* v. *Fletcher*, (1868) L. R. 3 H. L. 330, is not inconsistent with the Roman law. It imposes a liability on a proprietor which is measured by the non-natural user of his own property, not by that of his neighbour. It applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. It does not apply to the case of injury done to a peculiar trade apparatus unnecessarily so constructed as to be affected by minute currents of the escaping force.

In an action for damages by the appellant company for disturbances in the working of their submarine cable caused by an escape of electricity stored by the respondents for the due working of their tramway system:—

Held, in regard to that section of the tramway which had not been constructed under statutory authority, *Rylands* v. *Fletcher* did not apply, because the disturbances only resulted when the cable was constructed without certain precautions, which the evidence shewed had subsequently secured its immunity:

Held, in regard to those sections of the tramway which had been constructed under statutes (Act 22 of 1895 and Act 29 of 1896), that the escape of electricity, being a natural incident of the operations legalised thereby, and not resulting from a leak within the meaning of the statutory undertaking or condition, did not impose liability on the respondents. EASTERN AND SOUTH AFRICAN TELEGRAPH COMPANY *v.* CAPE TOWN TRAMWAYS COMPANIES - - - - **P. C. 381**

10. —— *Grant of Land—Construction—Title—Terms of Grant—Diagram.*

In a grant of land with certain specified boundaries "as will further appear by the diagram framed by the surveyor":—

Held, that, as a matter of construction, where the diagram is repugnant to the terms of the grant, the latter will prevail.

Although by arts. 8 and 13 of the Proclamation of August 6, 1813, there must be a diagram before a title be granted, yet the right of the grantee must be expressed in his title, and, when so expressed, will not be limited by the diagram. HORNE *v.* STRUBEN - - - - **P. C. 454**

11. —— *Practice—Special Leave to Appeal—Martial Law—Civil Tribunals.*

Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals.

The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging.

Elphinstone v. *Bedreechund*, (1830) 1 Knapp, P. C. 316, followed.

Special leave to appeal refused from a judgment affirming the rightful custody of the petitioner by the military authority in a district in which martial law prevails. D. F. MARAIS *v.* GENERAL OFFICER COMMANDING LINES OF COMMUNICATION AND THE ATTORNEY-GENERAL OF THE COLONY. *Ex parte* D. F. MARAIS - **P. C. 109**

12. —— **CEYLON**—*Practice—Special Leave—Appeal in Formâ Pauperis.*

Where a Colonial Code made no provision for appeals in formâ pauperis, and it was contended that the case was as regards amount, value, and nature fit to be taken in appeal, special leave was under the circumstances of the case granted. PONAMMA *v.* ARUMOGAM. *Ex parte* PONAMMA **P. C. 561**

13. —— *Probate, Revocation of—Issue as to Total Invalidity of Will—Declaration of partial Validity—Words or Clauses omitted from Probate.*

Words or clauses in a will ought not to be omitted from probate except upon evidence pointedly addressed thereto, and shewing their improper insertion.

Where probate granted to the appellant had been revoked on issues which impugned the validity of the will as a whole, no issue having been raised or evidence given as to its partial

PRIVY COUNCIL APPEALS—CEYLON—*contd.*
validity, the Supreme Court in appeal varied the decree of revocation by declaring that the deceased died intestate as to his immovable property only and expunging from the will the reference thereto:—

Held, on the evidence, that the revocation was right and that the appeal must be dismissed. There being no cross-appeal as to the modification decreed, it was nevertheless pointed out by their Lordships that it ought not to have been made except as a compromise by consent. KARUNARATNE *v.* FERDINANDUS - - **P. C. 405**

14. —— **GUERNSEY**—*Law of the Channel Islands—Title to Right of Way by the Public—Grant—Effect of Delay in suing after attaining Majority.*

In the Channel Islands, where the doctrine of dedication to the public is unknown, (1) title to a right of way must be made out by the public as by a private individual, by either grant or prescription; (2) a grant must be matter of record; and, *quære*, whether prescription will avail without proof of title:—

Held, in an action by the appellant to have it determined that the public had no right of way over his property, that a registered minute of a resolution of the Seigneur and resident tenants of the Island of Sark, where it was situated, which did not duly record a completed transaction of grant, being rather a note of an unaccepted offer, was neither in form nor effect sufficient to create a title in the public:

Held, also, that a minor is not required to bring an action of title within a year of his majority. GODFRAY *v.* CONSTABLES OF THE ISLAND OF SARK - - - - - **P. C. 534**

15. —— **HONG KONG**—*Company—Adoption of Articles of Association—Registration of Unsigned Articles—Acquiescence.*

Although a special resolution is the statutory mode of enacting articles of association, the adoption thereof by a company may be proved by a long course of acquiescence.

The unsigned articles of a company incorporated under Hong Kong Ordinance I. of 1865 (similar to the English Companies Act, 1862) were irregularly registered along with its memorandum of association; but it appeared that they had for nineteen years been published, acted on without objection, and from time to time amended and added to by special resolutions:—

Held, that they must be treated as valid and operative, and as having been adopted by the shareholders. HO TUNG *v.* MAN ON INSURANCE COMPANY - - - - **P. C. 232**

16. —— *Limitations, Statute of — Cause of Action — Grant of Letters of Administration — Powers of Registrar — Hong Kong Ordinances No.* 13 *of* 1864, *s.* 8; *No.* 8 *of* 1860, *s.* 39; *and No.* 9 *of* 1870, *s.* 1—*Construction.*

Held, in a suit for a partnership account brought by the administrator of a deceased partner, that the Statute of Limitations (Hong Kong Ordinance No. 13 of 1864, s. 8) ran from the grant of letters in 1897, and not from the grant of probate in 1886 of a forged will, which on revocation was void ab initio.

By the true construction of s. 39 of Ordinances

PRIVY COUNCIL APPEALS—HONG KONG—*continued.*
No. 8 of 1860, and No. 9 of 1870, s. 1, the registrar of the Court was merely placed in the position of a receiver of the intestate's estate pending the grant of letters, but without power to sue in respect thereof. CHAN KIT SAN *v.* HO FUNG HANG - - - - - **P. C. 257**

17. —— **ISLE OF MAN** — *Criminal Law — Conviction set aside—No evidence of Fraudulent Appropriation—Liability of Bank Director.*

Conviction of fraudulently appropriating the moneys of a bank set aside, it appearing that there was no evidence of the convict director, who had overdrawn on a so-called trust account irregularly opened in his name, having misappropriated any one draft to his own use in fraud (within the meaning of the Act) of the bank's right to have the money. NELSON *v.* THE KING **P. C. 250**

18. —— *Practice—Appeal—Criminal Conviction—Special Leave.*

Special leave to appeal is not given in a criminal case where the sentence was founded on the verdict of a jury, and there was evidence for the jury, and no special matter sufficient to countervail it. *Ex parte* ALDRED - - **P. C. 81**

19. —— **JAMAICA** — *Practice — New Trial refused—No Application for Discovery—Cancelment of Security by Married Woman for her Husband's Debts.*

Held, that the appellants could not enforce a charge on the respondent's share in her father's estate, obtained through their agent, who was also executor and trustee for her under her father's will, by pressure through her husband, whose debts were to be thereby secured, concealment of material facts, and without independent advice:

Held, further, that the appellants, who before the trial had made no application for discovery of documents, were not entitled to a new trial on the ground of an important document, shewn to have been accessible at the trial if called for, having since come to their knowledge. TURNBULL & CO. *v.* DUVAL - - - **P. C. 429**

20. —— **JERSEY**—*Contract, Construction of —Conflict of Laws—Intention of Parties as to Law applicable—Fire Policy—Award Condition precedent to Suit.*

Where the parties to a contract reside in different countries in which different systems of law prevail, their intention is the true criterion to determine by what law its interpretation and effect are to be governed.

Hamlyn & Co. v. *Talisker Distillery*, [1894] A. C. 202, followed.

Where a fire policy made in Jersey is nevertheless an English contract, no action can be brought upon it until the amount has been settled by arbitration according to the condition contained therein.

Scott v. *Avery*, (1855) 5 H. L. C. 811, followed. SPURRIER *v.* G. F. LA CLOCHE - **P. C. 446**

21. —— **NATAL**—*Actio Doli—Fraud—Law of Natal.*

Even assuming that an actio doli will only lie in Natal when no other action is open, in

PRIVY COUNCIL APPEALS—NATAL—*contd.*
accordance with the texts of Roman law, it is nevertheless open to a plaintiff who by the fraud of which he complains has been deprived of his other remedies; and by Roman-Dutch law is not barred in two years. DOUGLAS *v.* SANDER & Co. **P. C. 437**

22. —— *Practice—Appeal—Special Leave—Conviction by Special Court—Acting Judge—Colonial Laws Validity Act—Construction.*

The obvious meaning of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) is to preserve to the Imperial Parliament a right to legislate for a Colony to which a local legislature has been assigned, and to forbid the local legislature to enact anything repugnant to Imperial legislation so effected, but not otherwise to derogate from the general powers of Colonial legislatures.

An acting judge of the Supreme Court is a judge thereof within the meaning of Natal Special Court Act, No. 14 of 1900.

Special leave to appeal from a conviction by a Special Court of Natal (constituted under the said Act) refused. *In re* THE QUEEN *v.* MARAIS. *Ex parte* MARAIS - - - - **P. C. 51**

23. —— **NEW SOUTH WALES**—*Income Tax—New South Wales Land and Income Assessment Act*, 1895 (59 *Vict. No.* 15), *s.* 28, *sub-s.* 1—*Construction—Income Tax—Deduction of Fair Rent in respect of Crown Lease—Practice—Costs.*

Held, under New South Wales "Land and Income Tax Assessment Act of 1895," that the respondent, who carried on the business of a grazier on land held under a Crown lease (and therefore exempt from land tax), was not entitled to deduct from the taxable amount of his income in 1899 a sum representing the fair rental value of the leasehold premises and improvements thereon for that year. The deduction is not authorized by s. 28, sub-s. 1, the rental value not being an outgoing, loss, or expense within the meaning of that sub-section.

Decree of the Court below reversed, the appellant paying respondent's costs in accordance with the terms on which special leave to appeal had been granted. COMMISSIONERS OF TAXATION *v.* ANTILL - - - **P. C. 422**

24. —— *Land Tax—New South Wales Land and Income Tax Assessment Act of* 1895 (59 *Vict. No.* 15), *s.* 11, *sub-s.* 5—*Glebe Lands let on Leases—User and Occupation—Exemption from Land Tax.*

Held, that under the New South Wales Land and Income Tax Assessment Act, 1895, s. 11, sub-s. 5, glebe lands by Crown grant vested in the respondents for parochial church purposes in connection with the Church of England, but let on building leases or sub-divided for that purpose, were not exempt from assessment for land tax as being lands occupied or used exclusively in connection with public charitable purposes or a church.

Although the rents and profits of those lands might be so used by the trustees, yet so far as the lands were let on building leases they were not so used by the lessees, and so far as they were not let they were not occupied or used for any purpose. COMMISSIONERS OF TAXATION *v.* TRUSTEES OF ST. MARK'S GLEBE - - - **P. C. 416**

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25. —— *Mines—Payment of Miners according to Amount Excavated—New South Wales Coal Mines Regulation Act*, 1896 (60 *Vict. No.* 12), *s.* 38, *sub-s.* 1—*Construction.*

The respondent having been convicted of contravening s. 38, sub-s. 1, of the New South Wales Coal Mines Regulation Act of 1896 by not paying his miners according to the actual weight gotten by them of the mineral contracted to be gotten:—

Held, that on the true construction of the section, as it appeared that by the contract of employment the miners were to be paid according to the yardage of excavation, which had no necessary or constant relation to the amount of mineral gotten, the Act was inapplicable and the conviction was erroneous. HUMBLE *v.* HUMPHREYS - - - - - **P. C. 207**

26. —— **NEW ZEALAND** — *Confiscation—Regrant of Native Lands—Trust—Construction of Regrant.*

The expression "to be held in trust" for a definite class of persons is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings.

Kinloch v. *Secretary of State for India in Council*, (1882) 7 App. Cas. 625, referred to.

By an agreement in 1870 between the Government of New Zealand and certain natives whose names were scheduled thereto (which agreement was afterwards incorporated in the Mohaka and Waikare District Act, 1870), it was provided that the block of lands in suit, over which the Government had by force of a proclamation in 1867 issued under the New Zealand Settlement Act, 1863, an absolute power of disposition, native titles having been thereby extinguished, should be allotted to T., a Maori chief, and held in trust by him "in the manner provided or hereinafter to be provided by the General Assembly for native lands held under trust." In a suit by the appellants against T.'s devisees thereof to declare that the said block was held by T. as a trustee for the loyal owners thereof according to native custom and usage the natives beneficially entitled thereto:—

Held, that, under all the circumstances and notwithstanding the words of trust in the agreement, T. took absolutely and beneficially; and that the respondents were not affected by any trusts in favour of the appellants. The allottees of each block comprised in the agreement or their successors were the only persons beneficially entitled thereto.

Those circumstances were—that the Act contained no reference to any native custom or trust, but treated the scheduled persons as entitled to grants in fee simple (an expression inapplicable to lands held by native custom); that there was no evidence as to who were regarded in 1867 as loyal inhabitants or entitled to the benefits of the proclamation; that by the Native Lands Acts Amendment Act, 1881, certificates were to be given and grants made to the persons named in the schedule to the agreement of 1870 or their successors as tenants in common and not as joint tenants; that in 1882 certificates were ordered to be issued accordingly, and that T. received a

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

certificate and a grant to hold to him, his heirs and assigns, for ever as from September 12, 1870, subject to certain restrictions specified in s. 8 of the Act of 1881, but without reference to any trust or native custom; and that the General Assembly were not shewn to have declared any trusts in favour of the appellants. TE TEIRA TE PAEA *v.* TE ROERA TAREHA - - **P. C. 56**

27. —— *Forfeiture of Prohibited Goods by Innocent Holder—New Zealand Patents, Designs, and Trade Marks Act*, 1889, *No.* 12, *ss.* 89, 104—*Construction.*

Matchboxes, belonging to the respondents, stamped "New Zealand" but filled with London matches, thus bearing a false trade description, were seized on arrival in New Zealand as contraband. It was conceded that there was no fraudulent intention, or any intention to transgress the law of the Colony.

In an action against the appellant contesting the legality of the seizure:—

Held, that under ss. 89 and 104 of the New Zealand Patents, Designs, and Trade Marks Act, 1889, reproducing the Imperial Merchandise Marks Act, 1887, ss. 2, 16, the seizure must be upheld as of goods whose importation was prohibited. The only remedy was under s. 267 of the Customs Laws Consolidation Act, 1882, by means of an application to the Governor. COMMISSIONER OF TRADE AND CUSTOMS *v.* R. BELL & Co. - - - - - **P. C. 563**

28. —— *Omission to give Notice of Non-admission of Claims—Jurisdiction—Relief—New Zealand Public Works Act*, 1894 (58 *Vict. No.* 42), *s.* 44.

The appellants, having expropriated the lands of the respondents under the New Zealand Public Works Act, 1894, inadvertently omitted to give them notice, under s. 44, of non-admission of their claims for compensation within sixty days of receiving the same; and accordingly the respondents filed copies of their claims, with receipts for the service thereof, in the Supreme Court:—

Held, that, the claims having thereupon become enforceable awards under the Act, the appellants were not entitled, under the Act or otherwise, to any relief against the consequences of their omission. WELLINGTON CORPORATION *v.* JOHNSTON. WELLINGTON CORPORATION *v.* LLOYD **P. C. 396**

29. —— **VICTORIA**—*Banker and Customer—Transfer of Money from Company's Account to its Managing Director's overdrawn Private Account—Rights of Banker.*

In an action by a company to recover from its bankers moneys which, standing to the credit of its account, had been transferred by cheques of its managing director to the credit of his own overdrawn private account with the same bankers:—

Held, that the bank, acting in good faith and without notice of any irregularity, was not bound before honouring the cheques to inquire into the state of the account between the company and its managing director. BANK OF NEW SOUTH WALES *v.* GOULBURN VALLEY BUTTER COMPANY PROPRIETARY - - - - **P. C. 543**

PRIVY COUNCIL APPEALS—VICTORIA—*contd.*

30. —— *Book Debts—Invalidity of Assignment does not extend to Covenants and Recitals—Victorian Book Debts Act*, 1896, *s.* 3—*Construction.*

By the 3rd section of the Victorian Book Debts Act, 1896, it is enacted that no assignment or transfer of book debts shall be valid unless registered:—

Held, that by its true construction only that part of an instrument which effects assignment or transfer is invalidated by non-registration. The invalidity does not extend to the covenants and recitals therein contained.

Where, however, the unregistered assignment of a book debt contained covenants onerous to some of the assignors and a subsequent registered assignment omitted the same:—

Held, that, the second assignment being in substitution for the first, the covenants were no longer enforceable. NATIONAL BANK OF AUSTRALASIA *v.* J. FALKINGHAM & SONS - **P. C. 585**

31. —— *Probate Duty — Victorian Administration and Probate Act*, 1890, *No.* 1060, *s.* 115—*Construction—Intent to evade—Specialty Debt in New South Wales liable to Duty in Victoria.*

Sect. 115 of the Administration and Probate Act of Victoria, 1890, which relates to transfers made with intent to evade payment of duty, extends to and strikes at colourable transactions only.

Simms v. *Registrar of Probates*, [1900] A. C. 323, followed.

If the transfer is complete, a manifest desire on the part of the transferor to avoid liability to duty is not sufficient to prove an intent to evade payment within the meaning of the enactment.

A debt which though a specialty debt in New South Wales is a simple contract debt in Victoria, where both testator and debtor resided and were domiciled, is an asset in Victoria, recoverable under a Victorian probate, and liable to duty in Victoria. PAYNE *v.* THE KING - **P. C. 552**

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REVENUE—*Estate Duty—Settlement Estate Duty —Entailed Estate—Money held in Trust to Purchase Lands in Scotland or England to be entailed —Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 23, *sub-ss.* 14, 16.

By s. 23, sub-s. 14, of the Finance Act, 1894, "The expression settled property shall not include property held under entail." By sub-s. 16, "where an entailed estate passes on the death of the deceased to an institute or heir of entail who is not entitled to disentail such estate without" . . . . consent, "settlement estate duty as well as estate duty shall be paid in respect of such estate":—

Held, that money vested in trustees for the purpose of purchasing at their discretion lands in Scotland or in England to be strictly entailed is not "entailed estate" within the meaning of the Finance Act, 1894, and is not liable to "settlement estate duty."

Semble, per Lords Macnaghten, Brampton, Robertson, and Lindley, that if the money had been directed solely to be laid out in land in Scotland to be strictly entailed according to the Scottish law of entail, the money, in the sense of the Finance Act, 1894, would be "entailed estate," and therefore liable to "settlement estate duty."

Decision of the First Division of the Court of Session as the Court of Exchange in Scotland, (1901) 3 F. 440, affirmed. LORD ADVOCATE *v.* STEWART - - - - H. L. (Sc.) 344

2. —— *Income Tax—Company—Interest from Foreign Investments—Receipt in the United Kingdom—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Fourth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D, s.* 5.

Interest arising from foreign securities and paid abroad is not "received in the United Kingdom" within the meaning of the Income Tax Act, 1842, s. 100, Sched. D, Fourth Case, and is therefore not chargeable with income tax under that clause, unless it is remitted to the United Kingdom.

A life assurance society carried on business at home and abroad, the head office being in London where the accounts and balance-sheets were made up, the profits ascertained and the dividends paid. The interest upon the society's foreign securities paid abroad was received there by their agents, and part of it was applied abroad for the purposes of the society. All the interest on foreign securities was taken into account in the balance-sheets upon which the profits were ascertained:—

Held, that taking the interest into account was not equivalent to a receipt in the United Kingdom, and that income tax was not chargeable upon that part of the interest which was not remitted to the United Kingdom.

The decision of the Court of Appeal, [1901] 1 K. B. 153, reversed. GRESHAM LIFE ASSURANCE SOCIETY, LIMITED *v.* BISHOP (SURVEYOR OF TAXES) H. L. (E.) 287

3. —— *Stamp Duty — Railway Company — Increase of Nominal Capital—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

By the special Act of a railway company the existing preference stock of the company was cancelled and a new preference stock was created, to a larger amount and bearing a smaller dividend, the new stock being allotted so that each holder of the old stock received an amount of the new which gave him an equivalent dividend. The existing ordinary stock was cancelled and a new ordinary stock was created of twice the amount of the old, one half being preferred ordinary the other half deferred ordinary stock, each holder of the old stock receiving as much of each kind of the new as he held of the old ordinary stock:—

Held, that in each case the increase so authorized by the Act was "an increase of the amount of the nominal share capital" of the company within the meaning of s. 113 of the Stamp Act, 1891, and that the stamp duty imposed by that section was payable in respect of it.

The decision of the Court of Appeal, [1901] 1 K. B. 220, affirmed. MIDLAND RAILWAY COMPANY *v.* ATTORNEY-GENERAL - H. L. (E.) 171

—— Income tax—Deduction of fair rent in respect of Crown lease - - 422
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SALE OF GOODS — *Estoppel — Fraudulent Conversion of Goods—Loss to one of two Innocent Persons through Fraud of a third Person—Power of Disposition of Goods given to a Clerk—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 21.

The appellants, who were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk under an assumed name fraudulently sold timber of the appellants to the respondents, who knew nothing of the appellants or of the clerk under his real name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders to the respondents :—

Held, that the appellants, not having held out the clerk to the respondents as their agent to sell to the respondents, were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority himself, could not give the respondents any title; and that the appellants were entitled to recover from the respondents the value of the timber.

The decision of the Court of Appeal, [1901] 2 K. B. 697, reversed, and the judgment of Mathew J. restored. FARQUHARSON BROTHERS & Co. *v.* C. KING & Co. - - H. L. (E). 325

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SOLICITOR—*Confidential Relation—Solicitor and Client—Mistake—Rectification of Deed—Benefit conferred by Client on near Relative of Solicitor—Duty of Solicitor—Independent Advice.*

A solicitor, who was a trustee for a married woman under a settlement and also her husband's solicitor, prepared a deed by which she conferred a benefit on a son of the solicitor and renounced rights she had under the settlement. After hearing the solicitor's explanation of the deed she executed it:—

Held, that she was not bound by the deed, on the ground that the real effect of it on her rights and position was not in fact explained to her, and also on the ground that it was the duty of the solicitor to take care that she did not execute the deed without having independent advice.

The decision of the Court of Appeal, [1900] 2 Ch. 121, affirmed. WILLIS *v.* BARRON H. L. (E.) 271

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TRUST — *Charity — Will — Uncertainty — "Such Charitable or Public Purposes as my Trustee thinks proper"—Scottish Law.*

A testatrix by codicil in her own handwriting directed her trustee that—in the events which happened—one-half of the residue of her estate should be applied for "such charitable or public purposes as my trustee thinks proper":—

Held, affirming the decision of the Second Division of the Court of Session, (1900) 3 F. 274; 38 S. L. R. 209, that the direction was void for uncertainty. BLAIR *v.* DUNCAN - H. L. (Sc.) 37

2. —— *Purchase of Beneficiary's Interest by Trustee—Non-disclosure of Valuation by Trustee.*

The defender, who was one of the trustees and also a beneficiary under his parents' marriage contract, purchased the interest in the trust estate of his brother, who was not a trustee. At the date of the purchase the interest of the beneficiaries had vested absolutely, but the trust estate had not been realized, and its ultimate

TRUST—*continued.*
value was uncertain; but it was capable of being realized in the ordinary course of administration. Before purchasing his brother's share the trustee had in his possession a valuation of the trust estate made for the purpose of a loan on his own share. If the valuation turned out to be anywhere near correct, the trustee would make a profit of some hundred pounds on the purchase. The trustee never informed his brother of the valuation. On the brother being made bankrupt, the trustee in bankruptcy brought this action for reduction of the sale:—

Held, affirming the decision of the Court of Session, (1901) 3 F. 553, that the non-disclosure of the valuation rendered the sale null and void.

Lord Cairns' dictum in *Thomson* v. *Eastwood*, (1877) 2 App. Cas. 236, approved. DOUGAN *v.* MACPHERSON - - - - H. L. (Sc.) 197

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WILL—*Absolute Gift—Gift over on a Compound Event—Executory Devise—Perpetuity—Remoteness—Splitting Gift over—Cutting down Absolute Gift—Settlement—Intestacy—Construction of Will.*

A will made in 1850 gave residuary personal estate to trustees in trust for the testator's wife for life and after her death (which happened) to be divided into five portions which the testator allotted thus: "To S. D. (a married woman) I give two of such portions" and directed that the two-fifths allotted to S. D. should remain in trust for her life for her separate use, and from and after her decease in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marriage if daughters; "but in default of any such issue" the two-fifths to be divided among the children of C., payable to sons at twenty-five or to daughters at twenty-one or marriage.

S. D. died without having had a child. At her death there were children of C., daughters, who had all attained twenty-one or married:—

Held, (1) that the whole gift over on the death of S. D. was void for remoteness, and could not be split up into separate contingencies so as to be construed as a gift over on one contingency, that of S. D. having no child; and (2) that upon the death of S. D. there was no intestacy as to the two-fifths, but that by reason of the invalidity of the gift over on her death, the original absolute gift remained, and upon her death passed to her representatives.

Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be.

The decision of the Court of Appeal, [1901] 1 Ch. 482, affirmed. HANCOCK *v.* WATSON H. L. (E.) 14

2. —— "*Residue and Remainder*," *Bequest of—Bequest of Pecuniary Legacies—Specific Mortgage Debts—Intestacy—Undisposed of Personal Estate acquired between Dates of Will and Death—Administration—Legacies, Specific or Demonstrative—Fund applicable for Payment—Ambiguity—Intention—Extrinsic Evidence, Admissibility of—Evidence dehors the Will—Construction of Will.*

A testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of two specified mortgage debts then due to him, after payment of his debts and funeral and testamentary expenses (but not adding "and legacies"), to three persons named. At the date of the will the testator's personal estate consisted of the two mortgage debts, which were just sufficient for payment of the legacies (if payable thereout), debts, and funeral and testamentary expenses. Subsequently to the date of his will the testator became possessed of further personal estate, but as the will contained no general residuary gift this remained undisposed of. The total personal estate, exclusive of the two mortgage debts, was not sufficient for payment of the debts, funeral and testamentary expenses and legacies.

On an originating summons to ascertain in what order the assets should be applied:—

Held, that "the residue and remainder" of

WILL—*continued.*

the two mortgage debts meant what was left after payment thereout of the debts, funeral and testamentary expenses only, and that the undisposed of personalty could alone be resorted to for the general pecuniary legacies.

The decision of the Court of Appeal, [1900] 2 Ch. 756, reversed for the reasons there given by Rigby L.J. HIGGINS *v.* DAWSON **H. L. (E.) 1**

3. —— *Shifting Clause—Successive Life Estates—Limitations of Real Estates—Exception of Eldest Son "entitled" to other Estates—Construction of Will.*

A testator in 1855 devised his real estates to the use of all and every the sons of his nephew Richard successively, for their respective lives, "other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits" of the C. estates "after the decease of Richard as tenant for life or any greater estate or interest whatsoever."

In 1869 Richard and his eldest son, being then respectively tenant for life and tenant in tail in remainder of the C. estates, executed deeds under which those estates were disentailed and sold and the proceeds invested by trustees upon trusts under which the son took a beneficial interest. In 1875 the testator died. In 1899 Richard died:—

Held, that Richard's eldest son was not at his father's death "entitled" to the rents, &c., of the C. estates within the meaning of the exception clause, and was therefore not excluded from the succession to the testator's estates.

WILL—*continued.*

The decision of the Court of Appeal, *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, affirmed. LAW UNION AND CROWN INSURANCE COMPANY *v.* HILL **H. L. (E.) 263**

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—— Uncertainty—Trust—"Such charitable or public purposes as my trustee thinks proper" - - - - **37**
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—— "Entailed estate" - - - **344**
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See TRUST. 1.

—— "Tied" public-house - - - **24**
See MORTGAGE. 2.

WORKMEN'S COMPENSATION.
See Cases under EMPLOYER AND WORKMAN.

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